

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1967

No. 63

NELSON SIBRON, APPELLANT

vs.

NEW YORK

**APPEAL FROM THE COURT OF APPEALS OF THE STATE OF
NEW YORK**

FILED OCTOBER 6, 1966
PROBABLE JURISDICTION NOTED MARCH 13, 1967

Supreme Court of the United States

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[fol. 1]

Affidavit—General

IN THE CRIMINAL COURT OF THE CITY OF
NEW YORK

PART 1A, COUNTY OF KINGS

STATE OF NEW YORK,)
) SS.:
COUNTY OF KINGS)

COMPLAINT—Filed March 10, 1965

Ptl Martin—90 Pct of No —, County of kings, City of New York, being duly sworn, says, that on 3/9/65, at about 11.15 P.M. at in front of 742 Bway in the County of kings, City and State of New York, the defendant Nelson Sibron did violate sec1751 of the Penal Law in that he did feloniously and unlawfully possess a quantity of a narcotic drug to wit: Heroin as will appear from the following:

The defendnt was observed at different times at the above location talking to known narcotic addicts, each of whom would engage the defendant in a short conversation and then depart. As the officer approached the defendant, the latter being in the direction of the officer and seeing him, hedid put his hand in his left jacket pocket and pulled out a tinfoil envelope and didattempt to throw same to the ground. The officer never losing sight of the said envelope seized it from the deft's left hand, examined it and found it to contain ten glascine envelopes with a white substance alleged to be Heroin. When placed under arrest and questioned the defendant stated that it was his, that he was a user of narcotics and "it was the stuff."

WHEREFORE deponent prays that the defendant be dealt with according to law.

Sworn to before me 3/10/65.

/s/ [Illegible]
Judge

/s/ Ptl. Anthony Martin
Pending Leaves (see R & P 14/26.0)
Vacation None.
Other Leave None

County of King
 the defendant was advised pursuant to
 1694b of the Penal Law.

Date 4/23/65 Bail \$ 2B
 JOHN M. MURTAGH

Advised, the defendant was advised pursuant to
 1694b of the Penal Law.

Date 4/31/65 Judge. (KERN)

Adjournd to Bail \$

If paroled, the defendant was advised pursuant to
 1694b of the Penal Law.

Date Judge.

CRIMINAL COURT
PART 1A
 CITY OF NEW YORK
 County of King

THE PEOPLE OF THE STATE OF NEW YORK

1. Nelson vs. Subron

Address

2. 2B

Address

Address

Address

Defendant arraigned 3/10 1965

Hon. Martin Judge.

Officer and Shield No. 90

Assignment.

The defendant on being brought before me was

informed of the within charge of violation of

REDUCED TO 3305 P.H.L.

of his right to communicate with relatives or friends

by letter or telephone free of charge, of his right to

the aid of counsel at every stage of the proceedings

and before any further proceedings, of his right to

an adjournment to procure counsel, of his right to a

trial in a part of the Court held by a panel of three

judges, and if such trial is ordered, of his right to an

examination of the charge.

DATE 3/1/65

JOHN M. MURTAGH

Defendant pleads GUILTY

Date 4/23/65 1965

Judge.

Tried and found GUILTY

Date 4/23/65 1965

Judge.

Date 4/23/65 1965

Judge.

Complaint prepared by

Witnesses—name and address

RYAN-MALTER-ROSENBERG, J.

Def. Wanted 3358

WITHDRAWS PLEA OF NOT GUILTY

AND ENTERS PLEA OF GUILTY

APR 23 1965

JOHN L. RYAN

ABRAHAM GOETZ COURT REPORTER

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ABRAHAM GOETZ COURT REPORTER

ABRAHAM GOETZ COURT REPORTER

ORDER OF DISMISSAL

There being no sufficient cause to believe the within

named defendant

guilty of the offense within mentioned, I order said

defendant to be discharged.

Date Judge.

ORDER TO ANSWER

It appearing to me by the within depositions and

statements that the crime therein mentioned has been

committed, and that there is sufficient cause to believe

the within named defendant

guilty thereof, I order that said defendant be held

to answer in Part County of

on 1965 and be

admitted to bail in the sum of \$

and be committed to the Commissioner of Correction

of the City of New York until the said defendant

shall give such bail.

Date Judge.

Refund Number Court Clerk

Refund Number Court Clerk

Refund Number Court Clerk

Refund Number Court Clerk

Refund Number Court Clerk

Refund Number Court Clerk

Refund Number Court Clerk

Refund Number Court Clerk

Refund Number Court Clerk

RYAN-MALTER-ROSENBERG, J.

DEFENDANT ADVISED ON INFORMATION

UNDER SECTION 160.50 OF THE PENAL LAW

ADmits PRIOR CONVICTION

SENTENCE N.Y.C. Court

6 years in the State Prison

APR 23 1965

JOHN L. RYAN

ABRAHAM GOETZ COURT REPORTER

ABRAHAM GOETZ COURT REPORTER

ABRAHAM GOETZ COURT REPORTER

Adjourned to 3/31 Bail \$ 1000

at Part 1, County of King

If paroled, the defendant was advised pursuant to section 1694b of the Penal Law.

Date MAR 10 1965 Judge. [Signature]

Adjourned to _____ Bail \$ _____

If paroled, the defendant was advised pursuant to section 1694b of the Penal Law.

Date _____ Judge. _____

Adjourned to _____ Bail \$ _____

If paroled, the defendant was advised pursuant to section 1694b of the Penal Law.

Date _____ Judge. _____

H Schwartz A 2299 (61)
DOCKET No. _____

CRIMINAL COURT

OF THE CITY OF NEW YORK
1 Kings

Part _____ County of _____

THE PEOPLE OF THE STATE OF NEW YORK

vs.

Nelson Sibron - 27
1. 1678 St. Johns Place Bklyn

Address _____

2. _____

Address _____

3. _____

Address _____

4. _____

Address _____

5. _____

Address _____

6. _____

Address _____

Defendant arraigned 2/10/65, 19____

Hon. JAMES I. CAHILL Judge

Pt. Martin - 90 Pct
Officer and Shield No. _____

Assignment _____

The defendant on being brought before me was informed of the within charge of:

1751 PL

of his right to communicate with relatives or friends by letter or telephone, free of charge, of his right to the aid of counsel at every stage of the proceedings and before any further proceedings, of his right to an examination of the charge and of his right to an adjournment to prepare counsel or to communicate with anyone.

MAR 10 1965

WITNESSES—NAME AND ADDRESS

FRANK COUSNET
COURT REPORTER
DATE MAR 10 1965
3305 PHL
JOHN M. MURTAGH JUDGE

LEGAL AID REQUIRED AND ASSIGNED
DATE MAR 10 1965
REP. BY MR. [Signature]

[fol. 3]

Complaint prepared by [Signature]

Exam. Waived _____, 19____

Exam. Begun _____, 19____

Exam. Closed _____, 19____

ORDER OF DISMISSAL

There being no sufficient cause to believe the within named defendant

guilty of the offense within mentioned, I order said defendant to be discharged.

Date _____ Judge. _____

ORDER TO ANSWER

It appearing to me by the within depositions and statements that the crime therein mentioned has been committed, and that there is sufficient cause to believe the within named defendant

guilty thereof, I order that said defendant be held to answer, and be admitted to bail in the sum of \$ _____

and be committed to the Commissioner of Correction of the City of New York until the said defendant shall give such bail.

Date _____ Judge. _____

[fol. 4]

IN THE CRIMINAL COURT
OF THE CITY OF NEW YORK
PART 1A, COUNTY OF KINGS

Docket #: 2299

Charge: 1751 P.L.

IN THE MATTER OF
THE PEOPLE OF THE STATE OF NEW YORK
-against-
NELSON SIBRON, DEFENDANT

MINUTES OF WEDNESDAY, MARCH 31, 1965

BEFORE:

HON. JOHN M. MURTAGH, Criminal Court Judge

APPEARANCES:

For the People:

S. RAMETTA, ESQ.,
Assistant District Attorney

For the Defendant:

ROBERT REARDAN, ESQ.,
Legal Aid Society

COURT OFFICER: IRVING ZIGLER

FRANCIS M. COURTNEY
Official Court Reporter

[fol. 5] COURT OFFICER: Number 61. 2299; Nelson Sibron; Martin, 90 Precinct.; charged with 1751 of the Penal Law on the complaint of the Officer. Legal Aid.

MR. REARDAN: Your Honor, I believe the Laboratory report will indicate a misdemeanor charge. I will move to reduce the charge to a misdemeanor.

MR. RAMETTA: The defendant will plead guilty?

MR. REARDAN: No.

MR. RAMETTA: Did you see the sale?

PATROLMAN MARTIN: No.

MR. RAMETTA: And, have you got enough here for a Felony?

PATROLMAN MARTIN: No.

MR. RAMETTA: Your Honor reduce this to 3305 of the Public Health Law please?

THE COURT: Motion granted.

MR. RAMETTA: Send it upstairs for a motion to suppress, please.

THE COURT: 1C for Hearing.

* * *

"The above is a correct transcript of the minutes taken in this case."

/s/ Francis M. Courtney
Official Court Reporter

[fol. 6]

IN THE CRIMINAL COURT
OF THE CITY OF NEW YORK
PART 1C, BOROUGH OF BROOKLYN

Docket No. A 2299

Charge: Sec. 3305, P. H. L.

THE PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF

-against-

NELSON SIBRON, DEFENDANT

Brooklyn, N. Y.

MINUTES OF MARCH 31, 1965 ON MOTION TO SUPPRESS

BEFORE:

HON. MICHAEL KERN, Criminal Court Judge

APPEARANCES:

LOUIS JOSEPH, Esq.
Assistant District Attorney
For the People

JOSEPH KAPLAN, Esq.
%Legal Aid Society
360 Adams Street
Brooklyn, New York
For the Defendant

COURT OFFICER: HAROLD STEWART

ABRAHAM GOETZ, CSR
Official Court Reporter

[fol. 7] THE COURT OFFICER: The next matter is
Nelson Sibron. How about that one?

MR. KAPLAN: This is a motion to suppress, I think.

MR. JOSEPH: That was reduced downstairs.

THE COURT OFFICER: Are you ready on Nelson Sibron?

MR. JOSEPH: It is a motion to suppress.

THE COURT OFFICER: Are you prepared on anything now, Mr. Kaplan?

MR. KAPLAN: No.

THE COURT OFFICER: That's your answer.

(Case set aside, recalled in the P. M. session of the Court.)

P. M. SESSION

THE COURT OFFICER: Docket A 2299. Nelson Sibron, 3305 of the Public Health Law. Defendant is represented by Legal Aid. Motion to suppress; is that correct, Legal Aid?

MR. KAPLAN: Yes.

THE COURT: All right. Both sides ready on this motion?

MR. JOSEPH? People are ready. Go ahead.

THE COURT: Call your first witness, Mr. Kaplan.

[fol. 8] MR. KAPLAN: May I ask to have the officer excluded in this case?

THE COURT: All right. The officer is excluded.

(The officer referred to left the hearing room at this point.)

NELSON SIBRON, called as a witness on his own behalf, having first been duly sworn by the Court, was examined and testified as follows:

THE COURT: State your name, address and occupation.

THE WITNESS: Nelson Sibron; 1678 St. John's Place, Brooklyn; casting.

DIRECT EXAMINATION

BY MR. KAPLAN:

Q Mr. Sibron, you are a drug addict?

A Yes.

Q And you have a record, a police record?

A Yes.

MR. KAPLAN: May I have the yellow sheet?

Q (after being handed record referred to), You were convicted of 3305 in 1955; am I correct?

A Yes.

Q And you were convicted of burglary in 1956; am I correct?

A Yes.

[fol. 9] Q And you were convicted of 3305 in 1957; am I correct?

A Yes.

MR. KAPLAN: Etc. Etc. Your Honor, to save time, I would like to offer the yellow sheet which is attached to the District Attorney's papers in this case.

THE COURT: Received. Deemed marked, Exhibit "A."

(The yellow sheet referred to was do duly deemed marked.)

Q Mr. Sibron, you were present in front of 742 Broadway, Kings County, March 9, 1965?

A I was in a restaurant.

Q You remember being arrested that day?

A Yes.

Q Can you tell the Court everything that took place up to the time of the arrest? Tell the Court.

A I was in a restaurant. I was having a coffee and a piece of pie. The officer came and called me out of the restaurant and I went to him. So he asked me if I knew what he was looking for. I said, "No," so he searched me.

THE COURT: Did you know the officer?

THE WITNESS: No, sir.

THE COURT: Did you ever see him before?

THE WITNESS: I don't remember.

THE COURT: You don't remember whether you ever saw him before?

[fol. 10] Q Was he in uniform?

THE WITNESS: I don't live in that neighborhood.

THE COURT: Was he in uniform?

THE WITNESS: Yes. He called me out of the restaurant and I went to him. I thought he wanted to ask

me something. He put his hand in my pocket and he took out ten bags of heroin which I possessed at the time.

THE COURT: Did he show you a search warrant?

THE WITNESS: No, sir.

THE COURT: A warrant of arrest?

THE WITNESS: No, sir.

THE COURT: Were you with anybody at the time?

THE WITNESS: No, I was by myself there.

THE COURT: What pocket did he put his hand into?

THE WITNESS: My left pocket.

THE COURT: That jacket you are wearing now?

THE WITNESS: Yes.

THE COURT: He put his hand in the left side pocket?

THE WITNESS: Yes.

THE COURT: Did he take something out? Yes or no?

[fol. 11] THE WITNESS: Yes.

Q Did you throw anything to the ground?

A No, sir.

Q Are you familiar with Mapp versus Ohio, search and seizure?

MR. JOSEPH: I object to it.

THE COURT: Objection overruled.

MR. JOSEPH: Lots of lawyers don't know what it is.

THE COURT: Objection overruled. Are you familiar with the case?

MR. JOSEPH: Maybe the answer might be interesting.

THE COURT: That's exactly why I overruled the objection. Are you familiar with the case of Mapp against Ohio?

THE WITNESS: No, sir.

THE COURT: Do you know Mrs. Mapp or Miss Mapp?

MR. JOSEPH: From Ohio?

THE WITNESS: No.

THE COURT: All right. Go ahead, Mr. Kaplan.

Q Do you know whether there was any law about officers searching people in the street?

MR. JOSEPH: I object to that.

THE COURT: Objection overruled.

Q Do you know whether it is proper or not?
[fol. 12] A I know it is not proper.

THE COURT: You know what?

THE WITNESS: I know it is not proper.

THE COURT: For the benefit of the Court, Mr. Kaplan, do you mind?

MR. KAPLAN: No.

THE COURT: You answered your lawyer's question by saying you know it is not proper; is that what you said?

THE WITNESS: Yes.

THE COURT: Now what is not proper, Mr. Witness?

THE WITNESS: I don't know much about law, Judge.

THE COURT: But what is not proper? What is it you are talking about now?

THE WITNESS: I can't explain it. Just I heard it is not proper for an officer to search you, unless a person is committing a crime.

THE COURT: Look, Mr. Witness, don't be nervous. Sit back. I want to know something and you are the man to tell me. You say you know something about searching you is not proper. You mean it is not right? You mean it is not lawful? Is that what you want to tell me?

[fol. 13] THE WITNESS: Yes.

THE COURT: You understand the police officer has no right to search you?

THE WITNESS: Yes.

THE COURT: The police officer cannot search you; is that your understanding?

THE WITNESS: Yes.

THE COURT: That's his understanding, Mr. Kaplan.

MR. KAPLAN: No further questions.

THE COURT: Shades of Blackstone!

CROSS-EXAMINATION

BY MR. JOSEPH:

Q Do you know that from your past experience as a narcotic?

A Yes.

Q You told your counsel you were convicted how many times?

MR. KAPLAN: I object to this line. The best evidence is the sheet in evidence. The defendant admitted to that.

THE COURT: The objection is sustained.

Q You admitted to two or three?

A Yes, sir.

Q Isn't it a fact that you were convicted eight times?

MR. KAPLAN: Objection was sustained, I thought, Your Honor.

[fol. 14] THE COURT: The objection is sustained. I have the record; I have it before me.

MR. JOSEPH: Cross-examination, Judge.

THE COURT: On the credibility, was he right in saying two or three times? I will permit Mr. Joseph to go that far. Were you convicted two or three times or eight times?

MR. KAPLAN: I will object. He didn't testify that way. I was the one that read it off.

MR. JOSEPH: You stopped at two.

MR. KAPLAN: I stopped at two. Then I said, "Etc. Etc."

THE COURT: Objection sustained.

MR. KAPLAN: Thank you.

Q Now how long were you in this restaurant before the officer came in?

A About ten minutes.

Q Three minutes?

A Ten minutes.

Q And that's where you say the officer came over and searched you?

A Yes.

Q Now how long were you on the outside of the restaurant before you went in?

A I wasn't on the outside.

[fol. 15] How many people did you talk to?

A About two people.

Q About two people? What were you talking about?

A Nothing important.

Q Were you talking about narcotics?

A Yes.

MR. KAPLAN: I will object. It is irrelevant.

THE COURT: Objection overruled.

Q Weren't you? What were you talking about to these unknown people?

A They were asking me about some people which I don't remember.

Q Were you talking about narcotics?

A People.

Q Narcotic people?

A Yes.

Q These were narcotics you were talking to?

A Yes.

MR. JOSEPH: That's all.

MR. KAPLAN: Object, Your Honor.

THE COURT: Overruled.

MR. JOSEPH: I am satisfied. He answered my question.

MR. JOSEPH: Your witness.

MR. KAPLAN: I am finished with him.

[fol. 16] THE COURT: Next witness. Step down, sir.

MR. KAPLAN: The petitioner rests in this case.

THE COURT: Are you calling a witness? The police officer?

MR. JOSEPH: I think it is the duty on the part of the Legal Aid to call the police officer. He is making the motion. He can't keep any facts from the Court.

THE COURT: I think you ought to call the police officer. I am not so sure that Malinsky stands for the proposition that in every case the burden is on the people. People against Malinsky, I think, has been variously misinterpreted and I am not quite ready to say that the Court of Appeals meant in People against Malinsky that in every one of these cases, including applications to controvert a warrant or applications directed to the sufficiency or adequacy of the affidavit on which the warrant is based or probable cause, that in all those cases that the burden is on the people.

MR. KAPLAN: I agree with you.

THE COURT: At the same time, I would like to hear the police officer.

MR. JOSEPH: If the Legal Aid makes the motion, it is his duty to proceed with him.

MR. KAPLAN: I don't want to call him.

MR. JOSEPH: Then I will take him.

[fol. 17] THE COURT: Gentlemen, I think the Court has something to say.

MR. JOSEPH: You see the point they are raising? Now if I put him on, he will cross-examine him.

THE COURT: Mr. Joseph, I think he ought to be called.

MR. JOSEPH: I think he ought to be called by the Court.

THE COURT: The Court will call him.

MR. JOSEPH: And counsel will be restricted to the rules of evidence?

THE COURT: Oh, yes. He will be held to the rules of evidence. Call the police officer.

ANTHONY MARTIN, called as a witness on behalf of the Court, having first been duly sworn by the Court, was examined and testified as follows:

THE COURT: Name, shield number and assignment.

THE WITNESS: Patrolman Anthony Martin; 23303, 90th.

DIRECT EXAMINATION

BY MR. JOSEPH:

Q Officer, on March 9th, did you see this defendant?

A Yes, I did.

Q What time of the day or night was it?

A I seen him continually from the hours of 4:00 P. M. [fol. 18] to 12:00, midnight.

Q Where did you see him?

A In the vicinity of 742 Broadway.

Q How many hours did you say you saw him?

A Approximately eight hours.

Q What did this defendant do during that period of eight hours?

A He was in conversation with different known addicts.

MR. KAPLAN: Object. May I object to that, Your Honor.

THE COURT: What was that question? Mr. Joseph, there is a question being objected to.

MR. JOSEPH: The answer is already in, too.

THE COURT: Well, you shouldn't make an objection after the answer is in.

MR. KAPLAN: I only objected because the question was answered.

THE COURT: All right. What's the question?

THE OFFICIAL COURT REPORTER: (reading),

"Q What did this defendant do during that period of eight hours?

A He was in conversation with different known addicts."

THE COURT: Objection is overruled. The question and answer will stand.

Q Did you know these addicts?

[fol. 19] A Yes, I did.

Q Would you say how many addicts he spoke to?

MR. KAPLAN: Objection to reference to addicts.

MR. JOSEPH: He knows them, he says.

MR. KAPLAN: Well, how can we know these addicts?

THE COURT: We will call this a voir dire. Did you know the men with whom he spoke?

THE WITNESS: Yes.

THE COURT: Did you know them for some period of time?

THE WITNESS: Yes, I did.

THE COURT: Do you know if they are addicted to the use of narcotics?

THE WITNESS: Yes, I do.

THE COURT: How do you know that?

THE WITNESS: By their own admissions.

THE COURT: In conversations you have had with them, they have so stated to you?

THE WITNESS: Yes.

THE COURT: This is over a period of weeks or months or years?

THE WITNESS: I would say three months.

MR. KAPLAN: Everyone of them?

THE WITNESS: Everyone he had talked to.

MR. KAPLAN: Everyone he talked to, you knew [fol. 20] personally was an addict by way of an admission on the part of each one of them?

THE WITNESS: Yes.

MR. KAPLAN: How many did he talk to?

THE WITNESS: Six to eight.

MR. KAPLAN: You knew their names?

THE WITNESS: No, sir.

MR. KAPLAN: You just had gone up to them previously and asked them whether they were addicted; they said, "Yes"?

THE WITNESS: They talked to me before; I got their names but I forgot them.

MR. KAPLAN: Did you write them down?

THE WITNESS: At that time, yes.

MR. KAPLAN: Did you ever arrest any of these people?

MR. JOSEPH: Objection.

THE COURT: Objection sustained.

MR. KAPLAN: This is on the same issue.

THE COURT: We are only concerned with whether or not he knew them to be addicts. The police officer has no ground upon which to arrest an addict because he is an addict. Go ahead.

Q Officer, did there come a time when this defendant went to a restaurant?

[fol. 21] A Yes.

Q And did you follow him in the restaurant afterward?

A Yes, I did.

Q When you approached this restaurant, what did this defendant do?

A He was talking to three others.

Q Other addicts?

A Right.

Q On the inside?

A Yes.

Q In addition to the others he had spoken to?

A Yes.

Q As you approached him, what did you do?

A I asked him to come outside.

Q What did he do?

A He stepped out. I said, "You know what I am after." He had reached into his pocket and he held something into his hand. At the same time, I went into his pocket.

THE COURT: Officer, at the time you approached him, he was in the restaurant?

THE WITNESS: Yes, sir.

THE COURT: Did he then have something in his hand?

THE WITNESS: No, sir.

[fol. 22] THE COURT: As you approached him?

THE WITNESS: No, sir.

THE COURT: When did you first observe him to have something in his hand?

THE WITNESS: When I was questioning him.

THE COURT: You mean outside the restaurant?

THE WITNESS: Outside the restaurant, yes, sir.

THE COURT: And during the period in which you walked with him from the restaurant proper outside of the restaurant, did you see anything in his hand?

THE WITNESS: No, sir.

THE COURT: It was only while you were talking with him?

THE WITNESS: Yes, sir.

THE COURT: That you observed him do something?

THE WITNESS: Yes.

THE COURT: What did you see him do?

THE WITNESS: He had reached into his pocket.

THE COURT: Now you are indicating the use of the right hand?

THE WITNESS: It was the left hand, Your Honor.

THE COURT: The left hand. And you reached into what pocket with the left hand?

THE WITNESS: His left jacket pocket.

THE COURT: What did he do?

[fol. 23] THE WITNESS: At the same time I told him to take his hand out of his pocket, at the same time

I reached in with him and inside his pocket I saw in his hand and in his pocket he was ready to grab this cellophane—actually, it was a metal tin foil wrapper.

Q Did you see what it was in his hand at that time?

A I asked him what it was.

Q What did he do with it?

A I grabbed it off him.

Q Did he attempt to throw it away?

A Yes, sir. He was reaching in his pocket to throw it out.

Q Did it fall to the ground at any time?

A No, sir.

Q What did you find?

A Ten glassine envelopes.

Q Have you got them with you?

A Yes, sir.

Q Did you have them analyzed by the chemist?

A Yes, I did.

Q Do you have an analysis?

A Yes.

THE COURT: We are not concerned with that either, Mr. District Attorney. The only issue on this hearing is as to the circumstances under which the so-called [fol. 24] evidence was seized, as to whether or not there was probable cause or reasonable cause upon which the conduct or the action of the officer was predicated.

MR. JOSEPH: All right. Your witness.

CROSS-EXAMINATION

BY MR. KAPLAN:

Q When he reached into his pocket, you didn't think he was reaching for a weapon?

A I thought he might have been.

Q But he came up with a piece of tin foil; didn't he?

A Yes.

Q And that's when you grabbed his hand?

A Well, he had his hand in his pocket. I put my hand in his pocket. At that time I caught him with his hand in his pocket.

Q Just prior to that, you asked if he had something to give you?

A I said, "You know what I am looking for." He mumbled something and reached into his pocket.

Q You were in full uniform?

A Yes, sir.

Q Did you arrest anybody else that day?

A Not that day, no.

MR. KAPLAN: No further questions.

MR. JOSEPH: That's all. That's the people's [fol. 25] case. Rather, that is his motion to controvert.

REDIRECT EXAMINATION

BY THE COURT:

Q Officer, I want to satisfy myself as to something. You were in uniform at the time?

A Yes, sir.

Q And he knew, of course, you were a police officer?

A Yes, sir.

Q You said to him, "You know what I am looking for"?

A Yes.

Q Would you say at that time that he reached into his pocket and handed the packets to you? Is that what he did or did he drop the packets?

A He did not drop them. I do not know what his intentions were. He pushed his hand into his pocket.

MR. JOSEPH: You intercepted it; didn't you, Officer?

THE WITNESS: Yes.

Q You saw him in conversation with six or eight known narcotic addicts; is that correct?

A Yes.

Q You don't know what they were talking about?

A No, sir.

THE COURT: All right.

MR. JOSEPH: I have no further questions.

[fol. 26] MR. KAPLAN: No further questions.

THE COURT: Mr. Joseph, I don't see how I can do anything but grant the motion.

MR. JOSEPH: The officer says he spoke to eight or nine addicts.

THE COURT: I am concerned with this thought, if you can disabuse my mind as to this. Here is an approach made by a police officer in full uniform. Now one who complies with the request by a police officer, pursuant to a show of authority by a police officer in full uniform, do you consider that to be a voluntary compliance? In other words, if the police officer were not in uniform and he made certain observations, as a result of which he approached the defendant, then after a series of events, no matter what they were, the defendant attempted to discard this property and the police officer retrieved it, you would have a case or you might have a case. However, here is a police officer, known by the defendant to be a police officer. The police officer advances toward the defendant and says, "You know what I am looking for." The defendant—may it not be so—was overcome or overawed by a show of authority of a police officer who asks him point-blank or says to him point-blank, "I am looking for contraband." The defendant reaches into his pocket and is [fol. 27] about to take it out, the facts there are just as consistent with the interpretation he is about to take it out and hand it to the police officer, the police officer intercepted him.

MR. JOSEPH: It doesn't make any difference whether he were going to throw it away or had possession of it. And the officer had a right to believe that he had a right to search him.

THE COURT: Mr. District Attorney, there is no testimony in this record that the police officer heard any conversation between the defendant and any of the unknown men. All he knows about the unknown men: They are narcotics addicts. They might have been talking about the World Series. They might have been talking about prize fights.

MR. JOSEPH: The defendant admitted that he talked about narcotics. The officer had probable cause. Yes, he knew he talked to eight addicts.

THE COURT: The District Attorney now reminds me. I do recall the testimony of the defendant and your witness on the witness stand. He did say—and this is what now causes me to change my mind—

MR. KAPLAN: (int'g), Over my objection.

THE COURT: Over your objection. I think a Court shows itself to be fair, when it says one position [fol. 28] is tenable and then untenable; and when a Court changes its mind, unless there is just cause, it holds itself open to criticism. In the last few statements, there was a compliance by the defendant with a show of authority, this police officer being infulluniform. But now—and I say this again in a spirit of fairness and frankness—the District Attorney reminds me of something that I overlooked. The defendant did say from the witness stand in his sworn testimony that they were talking about narcotics.

MR. KAPLAN: Yes, but he testified he didn't hear this, the question involved here, as Your Honor so ably stated. On the question of probable cause—may I finish, Mr. Joseph, please?

MR. JOSEPH: Go ahead, finish.

MR. KAPLAN: On the officer's observations, not on what he thought was happening, not on what was actually happening but was probably happening in the officer's mind, we are not interested in fact here, we are not interested in the question here whether the defendant was, in fact, planning a burglary, talking about narcotics—

DENIAL OF MOTION TO SUPPRESS

THE COURT: (int'g), Mr. Kaplan, I am denying your motion.

MR. KAPLAN: Your Honor, I most respectfully [fol. 29] except.

THE COURT: I am sorry. I am denying your motion.

MR. KAPLAN: On what ground?

MR. JOSEPH: I object to his questioning the Court.

THE COURT: I don't mind questioning the Court. I won't conceal my opinion or camouflage it. It is my

opinion—this is what I am stating in my action—the police officer's action was predicated on probable cause. Motion is denied.

MR. KAPLAN: Without anything further?

THE COURT: Without anything further, Mr. Kaplan. What date?

OFFICER MARTIN: April 23rd.

MR. KAPLAN: Three-man bench?

THE COURT: Part 2B. April 23rd.

The above is a correct transcript of the minutes taken in this case.

/s/ Abraham Goetz, CSR
Official Court Reporter

[fol. 30] IN THE CRIMINAL COURT
 OF THE CITY OF NEW YORK
 PART 1C, BOROUGH OF BROOKLYN

✓ Docket No. A-2299

THE PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF

-vs.-

NELSON SIBRON, DEFENDANT

PRESENT:

HON. MICHAEL KERN, Judge

OPINION AND ORDER—March 31, 1965

The defendant having moved for an order of this Court, suppressing the evidence seized pursuant to such search warrant, and said motion having duly come on to be heard before this Court on the 31st day of March, 1965, and testimony having been heard by the Court, and due deliberation having been had herein, it is

ORDERED that said motion be and the same is hereby Denied and the Court hereby makes the following findings on the said motion. The Court is satisfied that there was probable cause for the action taken by the police officer.

/s/ Michael Kern
Judge

[fol. 31] IN THE CRIMINAL COURT
OF THE CITY OF NEW YORK
PART 2B, BOROUGH OF BROOKLYN

Docket No. A 2299

Charge: Sec. 3305, P. H. L.

THE PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF
~~against~~
NELSON SIBRON, DEFENDANT

MINUTES OF APRIL 23, 1965 ON PLEA AND SENTENCING
Brooklyn, N. Y.

BEFORE:

HON. JOHN J. RYAN, Criminal Court Judge,
Presiding
and

HON. PAULINE J. MALTER, HON. JACK ROSENBERG,
Associate Criminal Court Judges

APPEARANCES:

ALBERT SCLAFANI, ESQ.
Assistant District Attorney
For the People

JOSEPH KAPLAN, ESQ.
%Legal Aid Society
360 Adams Street
Brooklyn, New York
For the Defendant

COURT OFFICER: O. CHURCH

ABRAHAM GOETZ, CSR
Official Court Reporter

[fol. 32] THE COURT OFFICER: No. 10. Nelson Sibron. Jail case. Would you bring him up, Officer? This is a jail case. The officer is here.

JUDGE RYAN: Second call.

(Case set aside, later recalled.)

THE COURT OFFICER: No. 10. Nelson Sibron.

MR. KAPLAN: This is for disposition, Your Honor. It is contemplated by the defense here to plead this defendant guilty, if, in fact, Your Honors would rule on one point of law, if you will. This defendant lost a motion to suppress prior to today. Judge Kern held in Part 1C that there was probable cause and, therefore, the heroin in this particular case was not suppressed. If Your Honor would allow a retrial on the motion, a motion at the trial, it is on the voir dire, if I could reopen—

MR. SCLAFANI: (int'g), What Mr. Kaplan wants is two bites of the apple.

MR. KAPLAN: That's what I am asking.

JUDGE RYAN: Counsel, after the motion to suppress was denied, the Court's decision would be binding on this Court.

MR. KAPLAN: In that case, the defendant would [fol. 33] plead guilty to the 3305 to cover the entire information.

JUDGE RYAN: Would you arraign the defendant?

MR. SCLAFANI: Would Your Honor please warn this defendant of the provisions of the Code?

JUDGE RYAN: I must advise the defendant that a plea of guilty is equivalent to conviction after trial and that if he is found guilty either as a result of the plea or after trial and it develops after the acceptance of the plea that he has been previously found guilty of a violation of the Narcotics Law of the State of New York, not only will he be subject to a penalty but, in addition thereto, he will be subject to a mandatory jail sentence of six months.

MR. SCLAFANI: Are you Nelson Sibron?

MR. SIBRON: Yes.

MR. SCLAFANI: The District Attorney charges March 9, 1965, 11:50 P. M., in front of 742 Broadway, County of Kings, you did violate Section 3305 of the Public Health Law. You had in your possession a quantity of heroin. How do you plead?

MR. SIBRON: Guilty.

MR. SCLAFANI: Defendant pleads guilty.

MR. KAPLAN: Let the record indicate the defendant has examined the report from the Laboratory.

JUDGE RYAN: Now this plea made by the defendant [fol. 34] is made voluntarily, without threats or promises by the Court or the District Attorney?

MR. SIBRON: Voluntarily.

JUDGE RYAN: Date, counsel?

MR. KAPLAN: We will waive forty-eight hours.

THE COURT OFFICER: He is a multiple offender.

JUDGE RYAN: Mr. D. A., would you warn him?

MR. SCLAFANI: Now listen, Mr. Sibron. You are now being warned under Section 3305 of the Code of Criminal Procedure. You are charged, in your plea of guilty to the crime of 3305 of the Public Health Law, possession of narcotic drugs in violation of the Narcotic Drugs Law and pursuant to Section 1751 of the Penal Law, it is charged that on November 21, 1964, in the Criminal Court—no, on June 11, 1964, in the Criminal Court, before Judge Cullen, you received a sentence of six months for violation of the Narcotics Law, 3305 of the Public Health Law, and we now charge you with being a multiple narcotics offender. Now you may admit that you are that same Nelson Sibron, you may stand mute or deny that you are the person mentioned as the multiple narcotics offender. If you admit, a minimum mandatory sentence is six months in the New York City Penitentiary; [fol. 35] the maximum is an indefinite term. If you deny or stand mute, you may have a hearing before one or three judges of this Court to determine if you are the person mentioned in the multiple offender information; and if found to be the same person, the minimum mandatory or maximum mandatory sentence is six months or indefinite. Do you admit, stand mute or deny you are the same Nelson Sibron?

MR. SIBRON: I am the same.

MR. SCLAFANI: The defendant admits he is the same Nelson Sibron.

JUDGE RYAN: Would you approach the bench with the D. A.?

(Discussion off the record.)

JUDGE RYAN: What is your name?

MR. SIBRON: Nelson Sibron.

JUDGE RYAN: Is the defendant ready for sentence at this time?

MR. KAPLAN: Yes, Your Honor.

JUDGE RYAN: Any reason why sentence of this Court should not now be pronounced?

MR. KAPLAN: No, Your Honor.

JUDGE RYAN: Does the defendant waive the forty-eight hours allowed?

MR. KAPLAN: Yes, Your Honor.

[fol. 26] JUDGE RYAN: Do you wish to make a statement or do you wish your lawyer to make a statement on your behalf, counsel?

MR. KAPLAN: Your Honor, this defendant is a drug addict, self-admitted drug addict. He was apprehended in the store by the officer. The officer walked over and took the narcotics out of his hand. He came quietly to the station, didn't give the officer any trouble. He has been arrested many, many times before and spent many, many days in jail. This doesn't cure him. I don't think anything will cure him, except new legislation by the Legislature. I ask the minimum mandatory sentence in this case.

JUDGE RYAN: Sentence of the Court is six months in the workhouse.

MR. KAPLAN: Thank you.

The above is a correct transcript of the minutes taken in this case.

/s/ Abraham Goetz, CSR
Official Court Reporter

[fol. 37] IN THE APPELLATE TERM
 OF THE SUPREME COURT,
 SECOND JUDICIAL DEPARTMENT
 AT THE BOROUGH OF BROOKLYN

Cal.No.258—Sept.1965.

PRESENT—HON. ANTHONY J. DIGIOVANNA
 " " JAMES S. BROWN
 " " CHARLES MARGETT

Justices

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT

vs.

NELSON SIBRON, APPELLANT

ORDER—October 15, 1965

The above named Nelson Sibron, the defendant herein, having appealed to the Appellate Term, Supreme Court from a judgment of conviction of the Criminal Court of the City of New York, County of Kings, rendered on the 23rd. day of April, 1965, after a trial convicting him of a violation of

Section 3305 of the Public Health Law,
 and imposing sentence as follows:

Six Months in New York City Penitentiary,
 and the said appeal having been submitted by Mr. Kalamn Finkel, of counsel for the appellant, and submitted by Mr. Michael Schwartz, of counsel for the respondent, and due deliberation having been had thereon;

It is hereby ordered and adjudged that the judgment of conviction so appealed from be, and the same is hereby, affirmed.

/s/ J. S. B.
 J. S. C.

[fol. 38] No. 115 .

IN THE COURT OF APPEALS OF THE
STATE OF NEW YORK

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 7th day of July in the year of our Lord one thousand nine hundred and sixty-six, before the Judges of said Court.

WITNESS,

The HON. CHARLES S. DESMOND, Chief Judge,
Presiding

RAYMOND J. CANNON, Clerk

REMITTITUR—July 7, 1966

[fol. 39] App. T. No. 115. 66

THE PEOPLE &C., RESPONDENT

vs.

NELSON SIBRON, APPELLANT

Be it Remembered, That on the 7th day of March in the year of our Lord one thousand nine hundred and sixty-six, Nelson Sibron, the appellant—in this cause, came here unto the Court of Appeals, by Anthony F. Marra and Kalman Finkel, his attorneys, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Term of the Supreme Court, Second Judicial Department. And The People &c., the respondent—in said cause, afterwards appeared in said Court of Appeals by Aaron E. Koota, District Attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

[fol. 40] Whereupon, The said Court of Appeals having heard this cause argued by Mr. Kalman Finkel, of counsel for the appellant—, and by Mr. Michael Schwartz, of counsel for the respondent—, and after due deliberation

had thereon, did order and adjudge that the judgment herein be and the same hereby is affirmed.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Criminal Court of the City of New York, there to be proceeded upon according to law.

[fol. 41] Therefore, it is considered that the said judgment be affirmed, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Criminal Court of the City of New York, before the Judges thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Criminal Court, before the Judges thereof, &c.

/s/ Raymond J. Cannon
Clerk of the Court of Appeals
of the State of New York

[Clerk's Certificate to foregoing
transcript omitted in printing]

[fol. 42] IN THE COURT OF APPEALS
OF THE STATE OF NEW YORK

At a Court of Appeals for the State of New York, held
at Court of Appeals Hall in the City of Albany on the
twenty-second day of September A. D. 1966.

PRESENT,

HON. CHARLES S. DESMOND, Chief Judge, presiding

2

Mo. No. 886

THE PEOPLE &C., RESPONDENT

vs.

NELSON SIBRON, APPELLANT

ORDER AMENDING REMITTITUR—September 22, 1966

A motion to amend the remittitur in the above cause
having heretofore been made upon the part of the appel-
lant herein and papers having been submitted thereon
and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same here-
by is granted, the return of the remittitur requested and,
when returned, it will be amended by adding thereto the
following:

Upon the appeal herein there was presented and
necessarily passed upon a question under the Con-
stitution of the United States, viz.: Whether the
rights of the defendant-appellant under the Fourth
and Fourteenth Amendments were violated. The de-
fendant argued that Section 180-a of the New York
Code of Criminal Procedure is unconstitutional in
that it authorizes an unreasonable search and seizure.
The Court of Appeals considered this contention and
held that the statute does not authorize an unreason-
able search and seizure and that, in this case, there
was no denial of the defendant-appellant's constitu-
tional rights.

AND the Criminal Court of the City of New York
hereby is requested to direct its Clerk to return said re-
mittitur to this Court for amendment accordingly.

* * * *

[fol. 43] IN THE COURT OF APPEALS
OF THE STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT

v.

NELSON SIBRON, APPELLANT

OPINION—Decided July 7, 1966

* * *

[fol. 44] Judgment affirmed.

Concur: Chief Judge DESMOND and Judges BURKE, SCILEPPI, BERGAN and KEATING. Judge VAN VOORHIS dissents and votes to reverse in the following opinion; Judge FULD dissents and votes to reverse for the reasons stated in his dissenting opinion in *People v. Peters* (18 N Y 2d 238, 248), decided herewith.

VAN VOORHIS, J. (dissenting). There was no probable cause to make an arrest prior to the discovery of this package of heroin when the officer put his hand into the suspect's pocket allegedly frisking him for a dangerous weapon, nor do the People contend on this appeal that there was probable cause to make an arrest. The testimony of the officer on the pretrial hearing of the motion to suppress suggests that he was looking for violation of the narcotics law, inasmuch as he testified that he saw appellant talking with known drug addicts, and stated to him "You know what I am looking for." This may be enough to bring the appellant within subdivision 1 of section 180-a of the Code of Criminal Procedure which provides that "A police officer may stop any person abroad in a public place whom he reasonably suspects is committing, has committed or is about to commit a felony". On the basis of the heroin which the officer removed from his pocket, he was at first charged with violation of section 1751 of the Penal Law which is a felony, but this was reduced to the misdemeanor charge of violating section 3305 of the Public Health Law. Giving a liberal construction to the power of a police officer to stop and frisk,

under said section added by chapter 86 of the Laws of 1964, it may be assumed that the police officer reasonably suspected that this man was committing or was about to [fol. 45] commit a felony within the meaning of this statute, so that he was entitled to stop and frisk him. Until the discovery of the heroin in his pocket, the officer had, however, no probable cause on which to arrest him.

Denial of the motion to suppress the heroin which the officer took from his pocket depends, in order to be sustained, upon the theory that the officer had the right to frisk him under the first sentence of subdivision 2 of section 180-a, and that having found him in possession of the heroin instead of a knife or revolver the narcotic was properly seized and constituted a predicate for his ensuing arrest. This would be authorized by the last sentence of subdivision 2 of section 180-a, if it is constitutional, which reads: "If the police officer finds such a weapon or *any other thing the possession of which may constitute a crime*, he may take and keep it until the completion of the questioning, at which time he shall either return it, if lawfully possessed, or arrest such person." (Italics supplied.)

That sentence goes beyond anything decided in *People v. Rivera* (14 N Y 2d 441) or *People v. Pugach* (15 N Y 2d 65). The power to frisk is practically unlimited, inasmuch as whether an officer "reasonably suspects" that someone is committing, has committed or is about to commit a felony necessarily depends to a large extent upon the subjective operations of the mind of the officer. "The police may not arrest on mere suspicion" (*Mallory v. United States*, 354 U. S. 449, 454), although they may frisk on suspicion. The very abuses to which this important power is subject furnishes a strong reason for confining its exercise to the single purpose for which the frisk is countenanced—the discovery of dangerous weapons concealed upon the person of the suspect to protect the safety of the officer. To realize the awareness of the United States Supreme Court to the danger of dragnet procedures and general search after the manner of writs of assistance in colonial times one need only read the opinions in *Boyd v. United States* (116 U. S. 616) or *Marron*

v. *United States* (275 U. S. 192). Those who have opposed the constitutionality or fundamental fairness of stop and frisk have done so on the basis that it will result in general search and seizure upon the person of the suspect. Judge FULD'S dissent in *People v. Rivera* (*supra*, p. 448) will have been proved to be correct if the right to "stop and frisk" can be utilized as a ground for making a general search of the person. His dissent in *Rivera* begins with this statement: "I very much fear that, if this decision stands, a method will have been devised by which the Fourth Amendment's prohibition against unreasonable searches may be evaded and the exclusionary rule of *Mapp v. Ohio* (367 U. S. 643), to a large extent, written off the books."

[fol. 46] *If a frisk reveals a weapon, which is the only purpose for which it is authorized, then it should be confiscated and be evidence against the accused on a charge of unlawfully possessing or concealing a weapon or in any other criminal context in which the possession of a weapon is a factor.* If we go beyond that, then frisking a suspect, which can be done in practice (though not in theory) at the officer's whim, will become a pretext for the general search of the person, without probable cause, which the Fourteenth Amendment was designed to prevent. The power to frisk is an exception to the probable cause rule in search and seizure, and is not a search at all except for the discovery of a dangerous weapon concealed upon the person. There it should end, for all purposes. The protection thereby afforded to a policeman, and to bystanders if a shooting duel ensues, is so manifestly called for as a matter of common sense that the benefits to be derived should not be foregone by bending this wholesome device to a different and unintended purpose and by so doing subtly to subvert an important part of the Fourth Amendment.

In *Stanford v. Texas* (379 U. S. 476, 485) the Supreme Court said: "The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of

the officer executing the warrant.' *Marron v. United States*, 275 U. S. 192, at 196."

This language referring to describing particularly the things to be seized under a warrant, which is taken directly from the Fourth Amendment, lends strength by analogy to a rule that the products of a frisk should be limited to the purpose of the frisk which is to discover and seize dangerous weapons from the person of a suspect, and no more.

If the heroin seized from appellant can be used against him in this manner, what may happen in other instances can readily be perceived from *People v. Pugach* (15 N Y 2d 65, *supra*). There the defendant sat between two police officers in the rear seat of an automobile with a brief case upon his lap. They frisked him without discovering a weapon and then opened the brief case which contained a revolver. We held that the brief case was an extension of his person so that it was included within the frisk rule of *Rivera*. It is apparent that, if the police can go where they will opening brief cases and inspecting them for whatever they may contain, which, if contraband, may then be used against the possessor although the safety of the officer or public from violence is not remotely involved, we shall have progressed a considerable distance toward the police state.

Within limits it is true that a search may be made of the person as incident to an arrest without a warrant based on probable cause (*Harris v. United States*, 331 [fol. 47] U. S. 145), and where a warrant has been issued the officers conducting the search are not limited precisely to the articles of property enumerated therein, particularly if they are instrumentalities of crime (*Johnson v. United States*, 293 F. 2d 539, cert. den. 375 U. S. 888), although these rules are subject to limitation (*Preston v. United States*, 376 U. S. 364). But here there was neither search warrant nor arrest, nor probable cause for either. The frisk, whether authorized by statute or judicial decision, is an exception to the search and seizure rules which are all based on probable cause. In the interest of public policy, as it has existed since *Mapp v. Ohio* (367 U. S. 643), it seems to me that this exception should be strictly

circumscribed, that it is subject to limitations inherent in its own creation and that, unless the structure of protection against general search of the person is to be broken down, these limitations must be adhered to regardless of whether they conform precisely to legal logic. The frisk has its obvious justification as an exception to the probable cause rule and, it seems to me, also its obvious restrictions. It should not be allowed to become a dragnet or be used for purposes for which it is not intended.

Here, without probable cause, the frisk discovered the heroin, then the heroin served as a basis for arrest which, in turn, was claimed to justify the search which disclosed it. This violates the rule that a search cannot be supported by what it discloses. Neither can it be said, with any sense of reality, that since the officer could frisk almost at will, anything which he discovers can be utilized, however remote it may be from dangerous weapons, with the same effect as though the search had been incidental to a valid arrest or upon a warrant based on probable cause.

The judgment appealed from should be reversed and appellant's motion to suppress granted under section 813-c of the Code of Criminal Procedure.

Judgment affirmed.

[fol. 48]

[Triple Certificate to foregoing
paper omitted in printing]

[fol. 49] IN THE CRIMINAL COURT
OF THE CITY OF NEW YORK
COUNTY OF KINGS

Calendar No. ———

In the C.A. 315

Docket No. A2299

NELSON SIBRON, APPELLANT

v.

THE PEOPLE OF THE STATE OF NEW YORK, APPELLEE

NOTICE OF APPEAL TO THE SUPREME COURT OF THE
UNITED STATES—Dated September 2, 1966

1. Notice is hereby given that Nelson Sibron, the appellant above named, hereby appeals to the Supreme Court of the United States from the final order of the New York Court of Appeals entered on July 7, 1966, affirming the order and judgment of the Appellate Term, Second Judicial Department, entered on October 15, 1965 which affirmed the judgment of the Criminal Court of the City of New York, Kings County rendered on April 23, 1965.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Appellant was convicted of the crime of possession of narcotics in violation of Section 3305 of the Public Health Law and was sentenced to six months imprisonment. Appellant is presently incarcerated and in custody on another charge.

II. The Clerk will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States and include in said transcript the following:

- (1) Information
- (2) Minutes of hearing on motion to suppress evidence.
(March 31, 1965)

- (3) Minutes of Plea and Sentencing (April 23, 1965) [fol. 50]
- (4) Judgment of the Criminal Court
- (5) The Order of the Appellate Term affirming the judgment.
- (6) The Order of the Court of Appeals affirming the Order of the Appellate Term.
- (7) Amended remittitur in the Court of Appeals.
- (8) Notice of Appeal to the Supreme Court of the United States.

III. The following questions are presented by this appeal.

- (1) Whether Section 180-a of the New York Code of Criminal Procedure is unconstitutional on its face as repugnant to the Fourth and Fourteenth Amendments because it authorizes a detention on a standard less than probable cause to believe that a crime has been or is being committed.
- (2) Whether Section 180-a of the New York Code of Criminal Procedure is unconstitutional on its face as repugnant to the Fourth and Fourteenth Amendments because it authorizes the police to search an individual without a warrant or consent, and upon less than probable cause to believe he had committed or was committing a crime.
- (3) Whether Section 180-a is unconstitutional on its face as repugnant to the Fourth and Fourteenth Amendments insofar as it authorizes the police to seize things other than weapons which the prosecution may then utilize as evidence in a criminal action.
- (4) Whether, assuming that Section 180-a is not unconstitutional on its face, is it unconstitutional because of repugnancy to the Fourth and Fourteenth Amendments by virtue of its being held applicable to this case.
- (5) Whether appellant has been convicted in violation of his rights under the Fourth and Fourteenth Amendments, in that there was not probable cause

to arrest him and make an incidental search of his person.

[fol. 51]

/s/ Kalman Finkel
Attorney for Nelson Sibron,
Appellant
100 Centre Street
New York, New York 10013

Dated: New York, New York
September 2, 1966

[fol. 52]

[Proof of Service Omitted in printing]

[fol. 53]

SUPREME COURT OF THE UNITED STATES

No. 821 Misc., October Term, 1966

NELSON SIBRON, APPELLANT

v.

NEW YORK

**ORDER GRANTING MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS—March 13, 1967**

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis,

IT IS ORDERED by this Court that the said motion be, and the same is hereby, granted.

[fol. 54]

SUPREME COURT OF THE UNITED STATES

No. 821 Misc., October Term, 1966

NELSON SIBRON, APPELLANT

v.

NEW YORK

Appeal from the Court of Appeals of the State of New York.

ORDER NOTING PROBABLE JURISDICTION—March 13, 1967

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the appellate docket as No. 1139.

NOV 17 1966

AVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. [REDACTED]

1 [REDACTED]

74

JOHN FRANCIS PETERS,

Appellant,

—v.—

STATE OF NEW YORK,

Appellee.

No. [REDACTED]

1 [REDACTED]

63

NELSON SIBRON,

Appellant,

—v.—

STATE OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

**BRIEF OF NEW YORK CIVIL LIBERTIES UNION
AMICUS CURIAE**

NANETTE DEMBITZ

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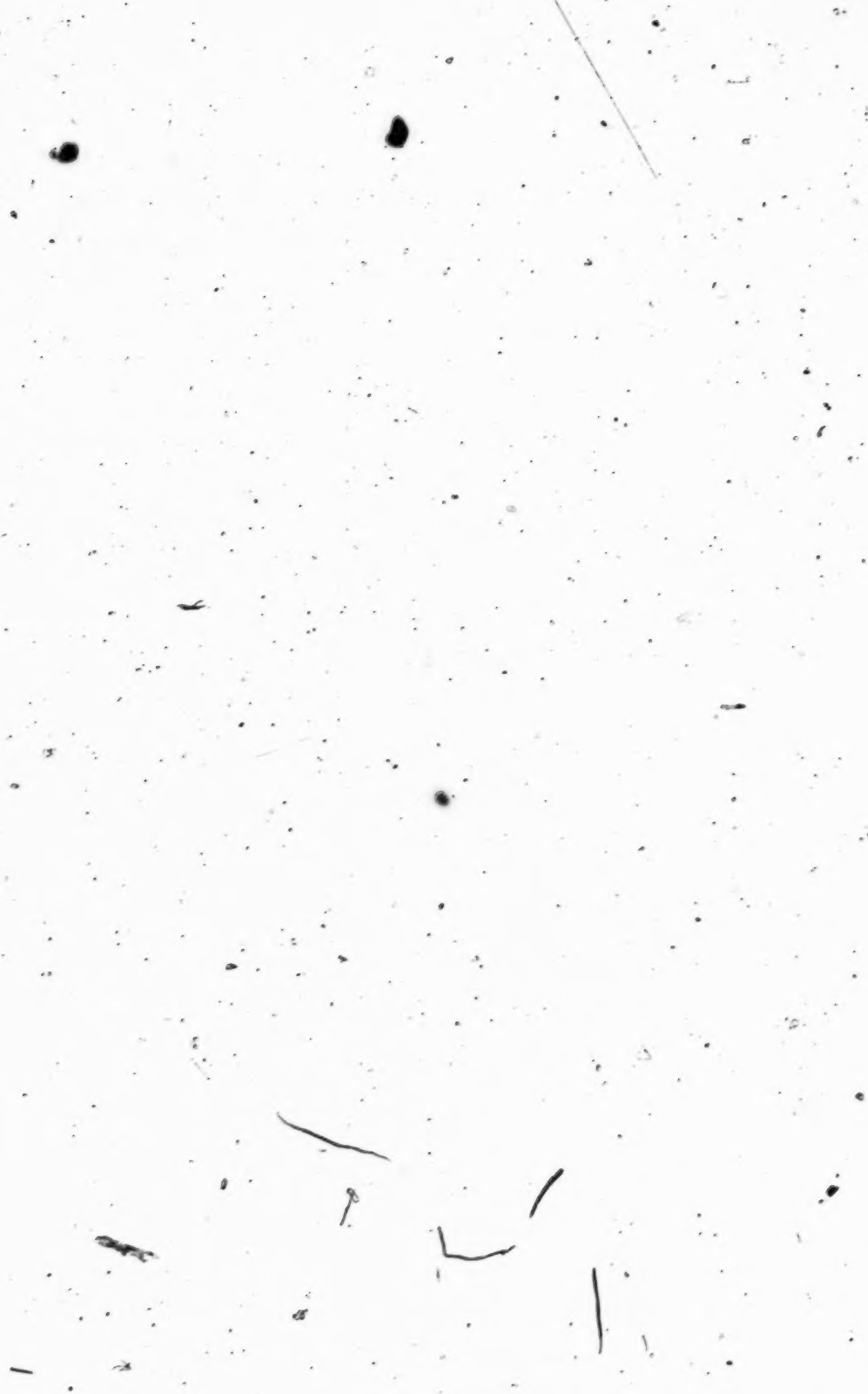
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1966

No. 846, Misc.

JOHN FRANCIS PETERS,

Appellant,

—v.—

STATE OF NEW YORK,

Appellee.

No. 821, Misc.

NELSON SIBRON,

Appellant,

—v.—

STATE OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

BRIEF OF NEW YORK CIVIL LIBERTIES UNION
AMICUS CURIAE

Interest of *Amicus Curiae*

The New York Civil Liberties Union, which files this brief with the consent of the parties, believes that the two cases at bar raise substantial federal questions under the Fourth and Fourteenth Amendments which should be heard and decided by this Court. The central question raised in each case is whether a police officer may search a suspicious looking person incident to an investigatory questioning of such person where the officer has neither a search warrant nor probable cause lawfully to arrest such person for any crime. In each of these cases, the New York Court of Appeals held that Section 180-a of the N. Y. Code of Criminal Procedure was constitutional and authorized the searches which occurred (18 N. Y. 2d 238, 244). The Court of Appeals further held (18 N. Y. 2d 242), that the searches and seizures involved in these cases were constitutional without regard to Section 180-a of the N. Y. Code of Criminal Procedure, upon the authority of its earlier decision in *People v. Rivera*, 14 N. Y. 2d 441 (1964), *cert. den.* 379 U. S. 978 (1965).

For the reasons set forth in this brief, we believe this Court should note jurisdiction so that this central question be fully briefed, argued and decided.

The Federal Questions Are Substantial

1. The federal questions raised in this appeal are of great public importance and concern. The New York statute and court decisions at issue on this appeal are merely examples—although extreme ones—of a growing trend of state statutes and state court decisions authorizing police

to stop, question, and "frisk" or search "suspicious persons" without probable cause to believe that the suspect has committed a crime. Section 180-a of the N. Y. Code of Criminal Procedure is modeled upon the Uniform Arrest Act promulgated more than twenty years ago by the Interstate Commission on Crime. See Warner, "The Uniform Arrest Act", 28 U. Va. L. Rev. 315 (1942). Statutes modeled on the Uniform Arrest Act have been enacted in New Hampshire, Rhode Island, and Delaware. N. H. Laws, §§594:2-3 (1955); R. I. Gen. Laws Ann. §12-7-1 (1965); Del. Code Ann. Tit. 11, §1902 (1953). Similar legislation has also been enacted in Hawaii, Massachusetts and the City of Miami, Florida. Rev. Laws of Hawaii, Tit. 30, ch. 255, §§4-5 (1955); Mass. Gen. Laws ch. 41, §98 (1961); Code of City of Miami, Florida, §43-46 (1957), as amended by Ord. No. 7,367 (1965).

The courts of at least two other states have authorized police to stop and frisk persons on mere suspicion and without probable cause to make an arrest. *People v. Mickelson*, 59 Cal. 2d 448, 450-51 (1963) (citing other California cases); *State v. Terry*, 5 Ohio App. 2d 122, 214 N. E. 2d 114, 34 Law Week 2458 (Ct. App., Cuyahoga Co. 1966).

The Model Code of Pre-Arrest Procedure, currently under study by the American Law Institute, contains a "stop and frisk" section similar to N. Y. Code of Criminal Procedure §180-a. (See report of this year's annual meeting of the Institute, 34 Law Week 2641 (5/24/66).) And within the past year similar stop and frisk statutes were considered, although not adopted, by the states of Illinois (H. B. 1078) and Michigan (S. B. 747).

2. The New York statute and case law presented for review on this appeal constitute the most extreme inroads

made by state courts or legislatures to date upon Fourth and Fourteenth Amendment rights. Both Section 180-a and the pre-statutory case law in New York authorize police to stop, question, and "frisk" or search a suspect whenever the policeman "reasonably suspects" that the suspect has committed, is committing, or is *about to commit* a crime. Although in at least one other state similar statutory language has been construed to constitute the equivalent of the recognized constitutional standard of probable cause to make an arrest, *De Salvatore v. State*, 52 Del. 550, 163 A. 2d 244, 249 (1960), the New York Court of Appeals in the instant case and in earlier cases has clearly stated that the "reasonable suspicion" required for a stop-and-frisk in New York is a lesser standard than probable cause:

"And the evidence needed to make the inquiry is not of the same degree or conclusiveness as that required for an arrest. The stopping of the individual to inquire is not an arrest and the ground upon which the police may make the inquiry may be less incriminating than the ground for an arrest for a crime known to have been committed." *People v. Peters*, 18 N. Y. 2d at 242 quoting from *People v. Rivera*, 14 N. Y. 2d at 445.

Moreover, the New York Court of Appeals has clearly defined its standard of "reasonable suspicion" in the broadest possible terms as constituting the mere *intuition* of the experienced police officer:

"By requiring the reasonable suspicion of a police officer, the statute incorporates *the experienced police officer's intuitive knowledge and appraisal* of criminal activity. His evaluation of the various factors involved insures a protective, as well as definitive, standard" 18 N. Y. 2d at 245. (Emphasis added.)

See also the similar definition adopted by the County Court of Westchester County in the *Peters* case, 254 N. Y. Supp. 2d 10, 12 (1964).

Indeed, the opinions of both the Court of Appeals and the County Court in *Peters* strongly imply that a person is protected from detention and search under §180-a only where his activities are "perfectly normal" 18 N. Y. 2d 246; see also 254 N. Y. Supp. 2d at 13.

In short, Judge Van Voorhis accurately defined the scope of §180-a and the New York case law in his dissent in *People v. Sibron*, below, as follows:

"The power to frisk is practically unlimited, inasmuch as whether an officer 'reasonably suspects' that someone is committing, has committed or is about to commit a felony necessarily depends to a large extent upon the subjective operations of the mind of the officer" 18 N. Y. 2d 605.

3. The authorization to police to search a suspect on "reasonable suspicion" or their own intuition is in sharp conflict with the Fourth Amendment's protection against unreasonable searches and seizures as heretofore defined by this Court. This Court has repeatedly held that any search of the person of an accused without a warrant is constitutional only if made incident to a lawful arrest based upon probable cause to believe that the accused has committed a crime. See, e.g., *Aguilar v. Texas*, 378 U. S. 108, 112 n.3, 122 (1964); *Ker v. California*, 374 U. S. 23, 34-35, 53 (1963); *Rios v. United States*, 364 U. S. 253, 261-62 (1960). This Court unequivocally rejected any form of "suspicion" as a standard to authorize any search in *Henry v. United States*, 361 U. S. 98, 101-102 (1959):

"As the early American decisions both before and immediately after its [the Fourth Amendment's] adoption show, common rumor or report, *suspicion*, or even '*strong reason to suspect*' was not adequate to support a warrant for arrest. And that principle has survived to this day. . . . It was against this background that scholars recently wrote, 'Arrest on mere suspicion collides violently with the basic human right of liberty.' . . . While a search without a warrant is, within limits, permissible if incident to a lawful arrest, if an arrest without a warrant is to support an incidental search, *it must be made with probable cause.*" (Emphasis added.)

4. The Court of Appeals below attempted to justify its authorization of "frisks" upon less than probable cause on the grounds that a frisk—which it defined as "the patting of the exterior of one's clothing in order to detect by touch the presence of a concealed weapon" (18 N. Y. 2d 245)—is a "lesser degree" invasion of privacy than a "full blown search of the person" (18 N. Y. 2d 245). However, the Court of Appeals has most definitely not limited either §180-a or its own decisional authorizations of stops-and-frisks to a mere "frisk" as defined above. In *People v. Peters*, officer Lasky's frisk of appellant was completed when he felt a hard object in appellant's pocket and withdrew an opaque envelope from the pocket. Lasky then went further, however, and searched the envelope. Similarly, in *People v. Sibron*, below, the Court of Appeals held valid a so-called frisk where "the officer put his hand into the suspect's pocket", 18 N. Y. 2d 604; and in *People v. Pugach*, 15 N. Y. 2d 65 (1965), cert. den. 380 U. S. 936 (1965), the Court of Appeals further held that police officers, as part of a so-called frisk, might search a suspect's briefcase.

In any event, the prior decisions of this Court under the Fourth Amendment clearly preclude any constitutional distinction between a "frisk" and a "full blown search". The governing principle that any such invasion of privacy is subject to constitutional protection was clearly held by this Court in *Mapp v. Ohio*, 367 U. S. 643, 646-47 (1961), where this Court reaffirmed the following doctrine announced in *Boyd v. United States*, 116 U. S. 616 (1886) and *Entick v. Carrington*, 19 How. St. Tr. 1030 (1765):

"The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offense,—it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of that judgment" 116 U. S. 630.

It is obvious that a frisk is an invasion into the "privacies of life", "personal security", and "personal liberty" of its

subject, and that, under the *Mapp*, *Boyd*, and *Entick* decisions, it is this invasion "that constitutes the essence of the offense" while any distinctions of degree which may exist between a frisk and a "full blown search" are merely differences as to the "circumstances of aggravation".

In accord with the foregoing, numerous courts have held that a frisk of an accused for weapons is, for constitutional purposes, indistinguishable from a "full blown search" of the accused's person. *White v. United States*, 271 F. 2d 829 (D. C. Cir. 1959); *State v. Collins*, 150 Conn. 488, 491-92 (1963); *Ellis v. United States*, 264 F. 2d 372, 374 (D. C. Cir. 1959), cert. den. 359 U. S. 998 (1959); *People v. Esposito*, 118 Misc. 867, 871-72, 194 N. Y. S. 326, 331-32 (Ct. Spec. Sess., 1922).

5. The supposed need for a policeman to frisk or search suspicious persons for the policeman's self-protection cannot justify the invasion of Fourth Amendment rights countenanced by the New York statute and case law brought for review upon the present appeals.

This Court has never heretofore permitted any relaxation of the constitutional requirements for searches and seizure on the grounds of self-defense of the police officer. Any such exception on grounds of expediency would seem markedly inconsistent with this Court's many holdings that fundamental Fourth and Fifth Amendment rights may not be violated in the supposed interests of better law enforcement or greater public safety. E.g. *Miranda v. Arizona*, 384 U. S. 436, 479-82 (1966); *Mapp v. Ohio*, 367 U. S. 643, 659-60 (1961). As Judge Fuld stated in his dissenting opinion below in the instant case:

"Of course, there are risks inherent in investigatory activities undertaken by the police but, certainly, it does not follow from that that the police are privileged, absent probable cause, to search anyone who looks or acts suspiciously and to use against him any articles they may find on his person. As I previously observed, 'Other methods are available whereby the police may protect themselves while carrying on their investigations, other procedures which, if utilized, will safeguard the police and the community from the criminal minority without destroying the sense of dignity and freedom with which the law-abiding majority walk the streets.' (*People v. Rivera*, 14 N. Y. 2d 441, 452 [dissenting opinion], cert. den. 379 U. S. 978.)" 18 N. Y. 2d at 248.

Similar doubts as to the law enforcement justification for stop and frisk legislation have been expressed by a justice of the Supreme Court of Michigan. Souris, *Stop and Frisk or Arrest and Search—The Use and Misuse of Euphemisms*, J. CRIM. L., C. & P. S. (1966).

Moreover, should this Court conclude that self-defense of the police officer may, under appropriate circumstances, itself constitute constitutional grounds for the officer to search a suspicious person, some definition of the circumstances under which such a self-defense search can be made is unquestionably needed. Although the New York Court of Appeals has rationalized the searches authorized by Section 180-a and by its own prior decisions on the basis of the self-defense needs of the police officer, the Court of Appeals has not limited either Section 180-a or its own pre-statutory decisions to circumstances where a frisk is genuinely necessary for the protection of the policeman.

In the *Peters* case, there is not one shred of evidence that officer Lasky reasonably—or even unreasonably—believed he was in any danger as he held Peters by the collar and questioned him at gun-point. Moreover, any danger that may have existed in that situation was removed at the moment when officer Lasky removed the opaque envelope from appellant's hip pocket. There existed no further possible danger to officer Lasky to justify his opening the envelope and examining its contents. Similarly, in *People v. Pugach*, 15 N. Y. 2d 65 (1965) where the police searched the defendant's briefcase before taking the defendant to the police station for questioning, any possible danger to the police from a weapon in the briefcase could have been eliminated by the simple expedient of keeping the briefcase away from the defendant in the front seat of the police car, and no search of the briefcase was necessary. See 15 N. Y. 2d at 71 (Fuld, J., dissenting). As Judge Van Voorhis noted in his dissent in *People v. Sibrón* in the court below, the authorization to search granted to the police in New York under Section 180-a and related court decisions has been defined so broadly that "the safety of the officer or public from violence is not remotely involved" 18 N. Y. 2d 607.

6. Finally, the search of appellant's person without probable cause cannot be upheld, as the Court of Appeals seemed to do below (18 N. Y. 2d at 244; see also *People v. Rivera, supra*, 14 N. Y. 2d at 444-46), on the ground that appellant was merely under investigative "detention" and not under arrest at the time the search occurred.

It might parenthetically be noted that the authority granted a police officer under subsection 1 of 180-a to "stop" a person on reasonable suspicion and "demand of him his name, address, and an explanation of his actions" raises

separate and substantial questions under this Court's recent decision in *Miranda v. Arizona*, 384 U. S. 436 (1966). See also Reich, *Police Questioning of Law Abiding Citizens*, 75 YALE L.J. 1161 (1966).

However, whether appellant's custody is called an "arrest" or a mere "investigatory detention" is irrelevant in determining the constitutionality of the search of his person without probable cause. The Fourth Amendment, as heretofore construed by this Court, does not merely prohibit searches incident to unlawful arrests; heretofore any search without a warrant, based upon probable cause, has been considered lawful only if made incident to a lawful arrest made upon probable cause. E.g. *Aguilar v. Texas*, 378 U. S. 108, 112 n.3, 122 (1964); *Ker v. California*, 374 U. S. 23, 34-35, 53 (1963); *Rios v. United States*, 364 U. S. 253, 261-62 (1960). There is no authority whatever justifying any search on the basis of its being reasonably incident to an "investigatory detention" made on less than probable cause.

In any event, in the *Peters* case appellant was not merely stopped politely for investigational purposes. On the contrary, officer Lasky "collared" appellant at gun-point. This constituted an assault or, at the very least, an arrest of appellant which was unlawful since it was not based upon probable cause. The undisputed facts of *Peters* are strikingly similar to the disputed testimony of the taxidriver in *United States v. Rios*, 364 U. S. 253, 257-258 (1960) which this Court held would, if believed by the trier of the facts, constitute an unlawful arrest. 364 U. S. at 261-62. See also other definitions of arrest in *Henry v. United States*, 361 U. S. 98, 103 (1959); *United States v. Scott*, 149 F. Supp. 837, 840 (D. D. C. 1957); *United States v. Viale*, 312 F. 2d 595, 601 (2d Cir. 1963).

CONCLUSION

Section 180-a of the N. Y. Code of Criminal Procedure and the rulings of the New York Court of Appeals below empower police to conduct searches and seizures under circumstances not heretofore tolerated by this Court. The decision whether these searches and seizures violate the Fourth and Fourteenth Amendments to the United States Constitution requires full briefing and oral argument before this Court.

Accordingly, it is urged that jurisdiction be noted.

Respectfully submitted,

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FILED

JAN 17 1967

JOHN F. DAVIS CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1966

63

NELSON SIBRON,

Appellant,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Appellee.

**BRIEF IN OPPOSITION TO PETITIONER'S
APPLICATION FOR LEAVE TO APPEAL
FROM THE COURT OF APPEALS OF THE
STATE OF NEW YORK**

AARON E. KOOTA
*District Attorney
Kings County*

MICHAEL SCHWARTZ
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IN THE
Supreme Court of the United States

October Term, 1966

No. 821 Misc.

NELSON SIBRON,

Appellant,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Appellee.

**BRIEF IN OPPOSITION TO PETITIONER'S
APPLICATION FOR LEAVE TO APPEAL
FROM THE COURT OF APPEALS OF THE
STATE OF NEW YORK**

Statement

Petitioner appeals from the order and judgment of the New York Court of Appeals entered on July 7, 1966 affirming an order of the Appellate Term of the Supreme Court of the State of New York, Second Judicial Department rendered on October 15, 1965 affirming a judgment of conviction rendered by the Criminal Court of the City of New York, County of Kings on April 23rd, 1965 convicting the appellant on his plea of guilty of a violation of Sec 3305 of the New York Public Health Law.

The Court of Appeals of the State of New York also affirmed an order denying a motion to suppress evidence

rendered in the Criminal Court of the City of New York, County of Kings, Part 1C by Honorable Michael Kern on March 31st, 1965.

Citation to Opinion Below

The decision of the Court of Appeals is reported at 18 N Y 2d 603. There is no opinion. However the dissent is included as Appendix "A" in petitioner's statement.

The Statute In Question

"Sec. 180-a. Temporary questioning of persons in public places; search for weapons.

1. A police officer may stop any person abroad in a public place whom he reasonably suspects is committing, has committed or is about to commit a felony or any of the crimes specified in section five hundred fifty-two of this chapter, and may demand of him his name, address and an explanation of his actions.

2. When a police officer has stopped a person for questioning pursuant to this section and reasonably suspects that he is in danger of life or limb, he may search such person for a dangerous weapon. If the police officer finds such a weapon or any other thing the possession of which may constitute a crime, he may take and keep it until the completion of the questioning, at which time he shall either return it, if lawfully possessed, or arrest such person. Added L.1964, c. 86, Sec. 2, eff. July 1, 1964."

The Hearing

NELSON SIBRON appeared as a witness in his own behalf and testified substantially as follows:

The defendant admitted that he was a drug addict and that he had a police record containing at least eight prior convictions of violations of the Narcotics Law and charges of Burglary (3, 8).*

The defendant stated that on March 9th, 1965 he was present in a restaurant located at 742 Broadway, in the County of Kings. He was having something to eat when an officer came in and called him out of the restaurant. The defendant accompanied the officer; the defendant was asked if he knew what the officer was looking for. The defendant denied knowledge and the officer proceeded to search him. He did not know the officer and could not remember if he had ever seen the officer before (4). The officer was in full uniform at the time. The officer put his hand in the defendant's pocket and took out ten bags of heroin which the defendant had on his possession at the time. The officer failed to exhibit any search or arrest warrant to the defendant at any time. The defendant stated further that he was alone in the restaurant at the time the officer approached him (5). He had been there approximately ten minutes prior to the officer's arrival (9). The defendant spoke to about two people. They were discussing narcotics. The people to whom the defendant was talking were narcotic addicts (10).

ANTHONY MARTIN was called as a witness by the Court and testified substantially as follows:

He is a member of the New York City Police Department holding the rank of Patrolman. He bears Shield Number 23303 and is assigned to the 90th Precinct. On March 9th

* Numbers in parenthesis refer to pages of the Hearing Minutes.

the officer had the defendant under observation from the hours of 4:00 P.M. to 12:00 midnight (12, 13). The officer saw him in the vicinity of 742 Broadway for a period of approximately eight hours. During this time the defendant was engaged in conversation with various known addicts (13). The witness knew these addicts personally for some period of time. He knew they were addicted to the use of narcotics by their own admissions and conversations that the witness had had with them over a period of three months (14). The defendant was observed engaging in conversations with six to eight such persons (15). There came a time when the defendant went into the restaurant and the officer followed. When the officer approached, the defendant was talking to three other known addicts inside the restaurant. These three were in addition to the others with whom he had previously conversed.

As he approached, the officer asked the defendant to come outside. The defendant stepped out. At the time the officer approached the defendant in the restaurant, the defendant did not have anything in his hand (16). The officer first observed the defendant reaching for something while the officer was questioning him outside the restaurant (17). When the defendant reached into his pocket, the officer thought that the defendant might be reaching for a weapon. The officer stated to the defendant, "You know what I am looking for," at which point the defendant mumbled something, reached into his pocket, (19) and grabbed something (16). The officer further testified that he just observed the defendant push his hand into his pocket. The witness stated that he did not know what the defendant's intentions were. The officer further stated that although he had observed the

defendant in conversation with six or eight known narcotic addicts, he was not able to overhear their conversations (20).

"Patrolman Martin: At the same time I told him to take his hand out of his pocket, at the same time I reached in with him and inside his pocket . . . it was a metal tin foil wrapper" (18).

"Cross Examination by Mr. Kaplan:

Q. When he reached into his pocket, you didn't think he was reaching for a weapon? A. *I thought he might have been.*

Q. But he came up with a piece of tin foil; didn't he? A. Yes. (19).

Q. Would you say at that time that he reached into his pocket and handed the packets to you? Is that what he did or did he drop the packets? A. He did not drop them. I do not know what his intentions were. He pushed his hand into his pocket.

Mr. Joseph: You intercepted it; didn't you, Officer?

The Witness: Yes". (20) (Emphasis supplied.)

POINT I

The officer's conduct in stopping and subsequently "searching" the defendant was reasonable under the facts.

According to the mandate of Section 180-a of the Code of Criminal Procedure, the officer committed no illegal acts with regard to the defendant's constitutional rights. Section 180-a of the Code of Criminal Procedure provides that a police officer may stop any person abroad in a public place whom he reasonably suspects is committing, has com-

mitted or is about to commit a felony or any of the other specified crimes, and may demand of him an explanation of his actions. This section goes on to state that when a police officer has stopped such a person and reasonably suspects that he (the officer) is in danger of life or limb, he may search such person for a dangerous weapon. According to the facts in the instant case, the police officer did stop the defendant who was in a public place associating with known narcotics addicts, the defendant himself being a narcotics addict. For purposes of this section it is submitted that the reasonable suspicions for questioning such a person are less than the probable cause that would be necessary to arrest such person. Also see *People v. Rivera*, 14 N Y 2d 441, *cert. den.*, 379 U.S. 978, and *People v. Entrialgo*, 19 A D 2d 509, *aff'd*, 14 N Y 2d 733. The officer in questioning the defendant observed the defendant mumble and reach into a jacket pocket. The officer saw, at midnight, on the street, a metallic glint coming from the suspect's pocket. It is submitted at this point the officer had reasonable cause to suspect that his life might be in danger as he did testify (19).

It need not be pointed out to the Court that the character and emotions of a narcotics addict are somewhat less than stable or predictable. An officer in investigating and questioning past midnight, on a street, in close proximity to the suspect, might have reasonable fear for his own safety.

"The pertinent circumstances are those of the moment, the actual ones (citing cases). Officers patrolling the streets at night do not prearrange the setting. They do not schedule their steps in the calm of an office. Things just happen. They are required as a matter of duty to act as reasonably prudent men

would act under the circumstances as those circumstances happen" *Bell v. United States*, 254 F. 2d 82, at 85, *cert. den.* 358 U.S. 885.

Also see *People v. Valentine*, 17 N Y 2d 128.

Luckily for all parties concerned, the defendant did not in fact have a weapon but was in fact turning over to the officer narcotics that he had on his person which were in a package wrapped in silver foil. It is submitted that if the officer was acting under statutory mandate (*People v. Norris*, 46 Misc. 2d 44), or the authority given him by this Court under its decision in *People v. Rivera*, 14 N Y 2d 441, *cert. den.* 379 U.S. 978, *supra*, to protect his own life and limb and therefore had justifiable cause to reach into the defendant's pocket to stop the progress of any weapon that might have been on the defendant's person, then certainly any contraband that was uncovered in this process was legitimately uncovered (*Harris v. United States*, 331 U.S. 145).

There is no indication in the record of any "full blown" search. Courts have condoned such actions by police officers on many other occasions. (*People v. Pugach*, 15 N Y 2d 65; *People v. Rivera*, 14 N Y 2d 441, *cert. den.* 379 U.S. 978; *People v. Hook*, 15 N Y 2d 776; *People v. Hoffman*, 24 A D 2d 497; *Matter of "Lang"*, 44 Misc. 2d 900.

"We are unable to accept the view which tends to deprecate, if not altogether to reject, as rank suspicion or an educated guess unworthy of acceptance, the experienced police officer's intuitive knowledge and appraisal of the appearance of criminal conduct or action, accomplished or in the course of accomplishment, as one of the factors in reasonable cause

for police action." *People v. Peters*, 44 Misc. 2d 470, 473, aff'd 24 A D 2d 989, aff'd. 18 N Y 2d 238.

Also see *U.S. v. Thomas*, 250 F. Supp. 771 (D.C.N.Y., 1966).

POINT II

Section 180-a of the Code of Criminal Procedure is constitutional.

At the inception of this argument it should be pointed out that the Supreme Court of the United States (*Mapp v. Ohio*, 367 U.S. 643) and the Court of Appeals of the State of New York (*People v. Loria*, 10 N Y 2d 368) have determined that the Fourth Amendment to the Constitution of the United States does not proscribe all searches, but merely unreasonable searches.

(a) A "stop" has been distinguished from an arrest.

There is a long tradition in the law allowing police officers to stop and detain suspects in a manner that does not amount to an arrest. The detained party's constitutional privileges have been held not to arise until an actual arrest has been made. See *United States v. Vita*, 294 F. 2d 924; also *United States v. Middleton*, 344 F. 2d 78; *United States v. Hall*, 348 F. 2d 837; *United States v. Cuppola*, 281 F. 2d 340, aff'd., 365 U.S. 762, notwithstanding this Court's decision in *Miranda v. Arizona*, 384 U.S. 436.

The record in the instant case does not indicate what the police officer was looking for. Was he looking for information, or a lead? Was he just trying to determine why this particular party had been malingering in the vicinity of a cafeteria for a period of 8 hours, associating with a large

number of known narcotics addicts? The defendant's conduct can be said to be more than merely suspicious. A police officer on the facts could be said to have a duty to stop and question such a person who was in a public place (*People v. Rivera*, 14 N Y 2d 441, *cert. den.*, 379 U.S. 978; *People v. Entrialgo*, 19 A D 2d 509, *aff'd*, 14 N Y 2d 733; *Matter of "Lang"*, 44 Misc. 2d 900.

As was stated by Mr. Justice Frankfurter:

"There can be no doubt that a search has as much justification here as it has in the case of an arrest for a crime, where it has been recognized as proper. E.g., *Agnello v. The United States*, 269 U.S. 20, 30; 70 L. ed. 145, 148; 46 S. Ct. 4; 51 ALR 409." *Abel v. United States*, 362 U.S. 217, 236.

Both on the facts in the instant case, and under the mandate of Section 180-a (Code Crim. Pro.), the officer's conduct was justified and cannot be said to be unconstitutional. He was performing, in the least obnoxious manner, a service to himself and to the appellant in preventing further harm to either from occurring, based on justifiable suspicions as they appeared to him at the time and under the existing circumstances. Certainly, with our hindsight, it would be unfair and unjust to condemn the officer's actions merely because his suspicions were not ultimately justified and no weapon was, in fact, found.

(b) There is no constitutional mandate that directs a search to be conducted solely on the basis of probable cause.

Nowhere in Section 180-a of the Code of Criminal Procedure, or in this Court's decision in *People v. Rivera, supra*, or on the facts in the instant case, is there any indication that a "full blown" search was performed upon the person

so involved and subsequently charged with a crime. The appellant defines a "frisk" as a detection by sense of touch. What difference is there if the perception is manual or ocular?

The Statute (§180-a N.Y. Code of Cr. Proc.) doesn't authorize a "full blown" search, but merely provides for a "search for weapons".

"The Mapp exclusionary rule was imposed upon the states not because of some command inherent in the Fourth Amendment, but rather because the Supreme Court believed that it was the only way the police could be forced to respect the Fourth Amendment. If the police could not obtain a conviction using evidence unlawfully obtained, they would have no incentive to conduct illegal searches. If we keep in mind this *raison d'être* of the exclusionary rule, we can guard against confusion in the attendant rules that are developed. (A judicial rule rendering evidence produced as the result of a 'frisk' inadmissible would fail to deter the police from 'frisking' suspects believed to be armed, as police 'frisk' for their own protection rather than for the purpose of looking for evidence.) A rule of inadmissibility in such cases could only result in allowing the armed criminal to go free although failing to any meaningful extent to protect individual liberty. The exclusionary rule of illegally obtained evidence cannot be interpreted solely to provide a tidy 'fox hunting' theory of criminal justice. The purpose of the exclusionary rule is to control police misconduct, and in this context it must be applied." *State v. Terry*, 214 N E 2d 114, Ohio Court of Appeals, 1966 (and cases cited therein).

The constitutionality of this type of conduct by a police officer has also been upheld in the State of California in a long line of decisions following *People v. Cahan*, 44 Cal. 2d 434, 282 P. 2d 905.

Also see N.H. Laws Sec. 594: 2-3 (1955); R.I. Gen. Laws Ann. Sec. 12-7-1 (1965); Del. Code Ann. Tit. 11, Sec. 1902 (1953). Similar legislation has also been enacted in Hawaii, Massachusetts and the City of Miami, Florida. Rev. Laws of Hawaii, Tit. 30, Ch. 255, Secs. 4-5 (1955); Mass. Gen. Laws Ch. 41, Sec. 98 (1961); Code of City of Miami, Florida, Sec. 43-46 (1957), as amended by Ord. No. 7, 367 (1965).

In deciding the law in the State of New York the Court of Appeals of the State of New York in the case of *People v. Peters*, 18 N Y 2d 238 stated:

"In *Rivera* we divided the problem into two stages: the legality of the detention and the legality of the frisk. With regard to the former, we noted (p. 444) that it is the business of police to *prevent* crime and that prompt inquiry into 'suspicious or unusual street action' is an indispensable police power 'And the evidence needed to make the inquiry is not of the same degree or conclusiveness as that required for an arrest.' "

And in the *Rivera* case the Court of Appeals of the State of New York further stated:

"The authority of the police to stop defendant and question him in the circumstances shown is perfectly clear. The business of the police is to prevent crime if they can. Prompt inquiry into suspicious or unusual street action is an indispensable police power in the orderly government of large urban communities . . . (444)

"the evidence needed to make the inquiry is not of the same degree or conclusiveness as that required for an arrest. The stopping of the individual to inquire is not an arrest and the ground upon which the police may make the inquiry may be less incriminating than the ground for an arrest for a crime known to have been committed . . . (445)

"The validity of the initial stopping and inquiry by police under suspicious circumstances is implicit, too, in the recent decision of this court (*People v. Entrialgo*, 14 N Y 2d 733) . . . (445)

"Indeed, the right of the police to stop and question the defendant in such circumstances as those disclosed by this record was recognized by common law . . . (445)

"The answer to the question propounded by the policeman may be a bullet; in any case the exposure to danger could be very great. We think the frisk is a reasonable and constitutionally permissible precaution to minimize that danger . . . (446)

"And as the right to stop and inquire is to be justified for a cause less conclusive than that which would sustain an arrest, so the right to frisk may be justified as an incident to inquiry upon grounds of elemental safety and precaution which might not initially sustain a search." (447) *People v. Rivera*, 14 N Y 2d 441, 444, 445, 446, 447.

And, as the Court of appeals of the State of New York further stated in the *Pugach* case:

"The Fourth Amendment, as we know, proscribes 'unreasonable' searches and seizures. The determination of unreasonableness depends on surrounding facts and circumstances and, as we have said, 'in-

volves a balancing of interests.' We recently dealt with the reasonableness of a routine 'frisk' made by police officers as an incident in the detention of a pedestrian whose actions had aroused the officers' suspicions and whether the fully loaded gun thus obtained should have been suppressed. Under the facts adduced, we were satisfied that a 'frisk' of a defendant was a reasonable and constitutionally permissive precaution to minimize the danger to a policeman who is trying to determine whether a crime has been or is about to be committed; in other words, that a 'frisk' is distinguishable from a constitutionally protected search. We took pains to point out that the right to 'frisk' is justified as an incident to an inquiry upon grounds of safety and precaution which might not initially sustain a search (*People v. Rivera*, 19 A D 2d 863, revd. 14 N Y 2d 441)." (*People v. Pugach*, 15 N Y 2d 65, at 69.

POINT III

Petitioner's application for leave to appeal to the Supreme Court of the United States should be denied.

Dated: Brooklyn, New York,
January 1967.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

AUG 31 1967

OCTOBER TERM, 1967

JOHN F. DAVIS, CLERK

No. 63

NELSON SIBBON,

Appellant,

VS.

NEW YORK.

**ON APPEAL FROM THE COURT OF APPEALS OF THE
STATE OF NEW YORK**

BRIEF FOR APPELLANT

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 63

NELSON SIBBON,

Appellant,

vs.

NEW YORK.

ON APPEAL FROM THE COURT OF APPEALS OF THE
STATE OF NEW YORK

BRIEF FOR APPELLANT

Opinions Below

In the court of appeals, no opinion was written in affirming the conviction. 18 N.Y. 2d 603 (R. 31).^{*} Separate dissenting opinions were written by Judges Fuld and Van Voorhis. 18 N.Y. 2d 248, and 18 N.Y. 2d 603 (R. 31). On September 26, 1966, the New York Court of Appeals amended its remittitur. 18 N.Y. 2d 723 (R. 30). The lower New York courts wrote no opinions.

^{*}References to the printed record on appeal are designated "R."

Jurisdiction

The judgment of the New York Court of Appeals was entered July 7, 1966. A timely notice of appeal was served and a statement of jurisdiction was filed on September 2, 1966. An order noting probable jurisdiction was entered on March 13, 1967 (R. 39).

The jurisdiction of this Court rests upon Title 28 U.S.C. §1257(2).

Questions Presented

Whether Section 180-a of the New York Code of Criminal Procedure violates the Fourth and Fourteenth Amendments on its face because it authorizes an unreasonable search.

Whether Section 180-a of the New York Code of Criminal Procedure violates the Fourth and Fourteenth Amendments on its face because it authorizes an unreasonable seizure of the person.

Whether, assuming arguendo, that Section 180-a of the New York Code of Criminal Procedure is not unconstitutional on its face, it is unconstitutional by reason of its application to this case.

Constitutional and Statutory Provisions Involved

The New York statute drawn into question is Section 180-a of the Code of Criminal Procedure:

1. A police officer may stop any person abroad in a public place whom he reasonably suspects is com-

mitting, has committed or is about to commit a felony or any of the crimes specified in section five hundred fifty-two of this chapter, and may demand of him his name, address and an explanation of his actions.

2. When a police officer has stopped a person for questioning pursuant to this section and reasonably suspects that he is in danger of life or limb, he may search such person for a dangerous weapon. If the police officer finds such a weapon or any other thing the possession of which may constitute a crime, he may take and keep it until the completion of the questioning, at which time he shall either return it, if lawfully possessed, or arrest such person. Added L. 1964, C. 86, §2, eff. July 1, 1964.

The Constitutional provisions involved are Amendments Four and Fourteen:

Constitution of the United States, Amendment IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

*Constitution of the United States, Amendment XIV,
Section 1.*

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;

nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement

On March 10, 1965, a complaint was filed in the Criminal Court of the City of New York, charging the appellant with unlawful possession of narcotics.

On March 31, 1965 a hearing was held on appellant's motion to suppress 10 bags of narcotics which he claimed were seized after an illegal search of his person. At the conclusion of the hearing appellant's motion was denied. He then pleaded guilty to unlawful possession of narcotics and was sentenced to six months imprisonment.

Appellant appealed to the Appellate Term of the Supreme Court, Second Judicial Department, from the judgment of conviction. The denial of the suppression motion was reviewed upon appeal by virtue of New York Code of Criminal Procedure §813-c.

The Appellate Term affirmed the judgment without opinion (*New York Law Journal*, October 15, 1965). On appeal to the Court of Appeals of the State of New York, the decision of the Appellate Term was affirmed, two judges dissenting (Fuld, J. and Van Voorhis, J.).

At the hearing on the motion to suppress evidence, NELSON SIBRON, appellant, testified that on the date in question he was sitting in a restaurant having coffee and a piece of pie when an officer came in and told him to go outside (R. 8). When appellant went outside with the officer, the officer asked him whether he knew what the

officer was looking for (R. 8). When appellant answered no, the officer put his hand in appellant's pocket and removed 10 bags of heroin (R. 8-9). On cross-examination appellant stated he had been talking "about narcotic people" during the period in question (R. 12).

PATROLMAN ANTHONY MARTIN testified that on March 9, 1965, while in uniform (R. 8, 18), he saw appellant continually from 4 p.m. to 12 p.m. in the vicinity of 742 Broadway, Brooklyn, New York (R. 13). During this time appellant "was in conversation with different known drug addicts" (R. 14). Martin fixed the number of addicts spoken to at 6 or 8 (R. 15). The officer observed appellant enter a restaurant. He followed him there and saw him speaking with three drug addicts. Martin approached appellant and told him to come outside. Appellant complied with the order (R. 15-16).

Once outside the restaurant Martin stated "You know what I am looking for" and appellant in response, "mumbled something and reached into his pocket" (R. 18). Patrolman Martin put his hand in appellant's pocket and caught appellant's hand as he was about to take out a metal tin foil wrapper (R. 17-18). The officer testified: "I saw in his hand and in his pocket he was ready to grab this cellophane, actually, it was a metal tin foil wrapper" (R. 17).*

On cross-examination the officer testified that when appellant reached into his pocket he thought he might have been reaching for a weapon (R. 17).

* It should be noted that the officer in his sworn complaint stated that appellant "pulled out a tin foil envelope and did attempt to throw same to the ground. The officer never losing sight of the said envelope seized it from the defendant's left hand, . . ." (R. 1).

Under the court's questioning the officer explicitly testified that during the period he observed appellant conversing with the drug addicts, he did not overhear their conversations (R. 18).

The trial court initially was disposed to grant appellant's motion to suppress evidence:

"Mr. Joseph [the Assistant District Attorney] I don't see how I can do anything but grant the motion.

• • • • •

There is no testimony in this record that the police officer heard any conversation between the defendant and any of the unknown men. All he knows about the unknown men: they are narcotics addicts. They might have been talking about the World Series. They might have been talking about prize fights" (R. 18-19).

The Assistant District Attorney then stated to the court that according to appellant's testimony at the suppression hearing, the appellant admitted that he talked about narcotics (R. 19). The court, over objection and despite the fact that the officer testified he did not hear any of these conversations, denied the motion to suppress with the following finding:

"It is my opinion—this is what I am stating in my action—the police officer's action was predicated on probable cause. Motion is denied" (R. 20-21).*

In their brief to both the Appellate Term and the Court of Appeals, with regard to the issue of probable cause the prosecution took the following position:

* The court had previously rejected the theory that the appellant consented to the search (R. 19).

" . . . that on the basis of the record in the instant case it would not be possible to take a position on the question of probable cause for the record did not indicate whether or not the officer observed any transactions. The record also does not indicate the method of observation: whether the observations was made over an intermittent period or whether the defendant was under constant observation for an eight hour period" (Respondent's brief to the Court of Appeals, page 4).

The prosecution argued that the police officer's stop and search of the appellant was authorized by Section 180-a of the Code of Criminal Procedure. This justification for the search was not advanced at the hearing even though the statute had been in effect for a year.

Appellant argued that Section 180-a was unconstitutional on its face by reason of its repugnancy to the Fourth and Fourteenth Amendments to the Constitution; that Section 180-a was unconstitutional if applied to this case by reason of its repugnancy to the Fourth and Fourteenth Amendments to the Constitution, and that appellant had been convicted in violation of his rights under the Fourth and Fourteenth Amendments.

The Court of Appeals affirmed without opinion, two judges dissenting. Judge Fuld, in his dissenting opinion, stated that Section 180-a of the Code of Criminal Procedure, which authorizes a search upon less than probable or reasonable cause, is unconstitutional. Judge Van Voorhis dissented on the ground that the seizure, without probable cause, of any item other than a weapon is unconstitutional.

Introduction

After this Court's decision in *Mapp v. Ohio*, 367 U.S. 643 (1961), the states were confronted with the necessity of reconciling police methods of crime investigation with the citizen's Fourth Amendment right to be free from unreasonable interferences with his person or property.

Although some commentators point to the radical changes in our society as the source of the problem, the dilemma of state law enforcement today in the Fourth Amendment area is one of its own making. The state law enforcement agencies have had 18 years since *Wolf v. Colorado*, 338 U.S. 25 (1949) to tailor their practices in accordance with a clear mandate from this Court, yet throughout this whole period no such change in practice resulted.

Before *Mapp*, an official choice between the necessities of law enforcement, as the police viewed them, and the Fourth Amendment guarantees never had to be made. Lip service might be paid to principle, but the day to day practice of law enforcement was shaped by what the agencies deemed necessary, rather than by the Fourth Amendment. After the decision in *Mapp*, such an official choice did become necessary—either the police practices, which had evolved in most states without either legislative or judicial restriction on Fourth Amendment grounds, would have to conform to constitutional doctrine, or constitutional doctrine to current practice.

After *Mapp*, this Court, with full awareness of the problems of law enforcement in a modern society, has emphasized the paramount right of the individual when confronted with the choice. On the other hand, the state's response to this dilemma, caused by prior abdication of

control over police practices, was a subtle and, initially, gradual yielding to the demands of the police at the expense of individual rights. The result was a disheartening step backwards from the new era of personal security which *Mapp* should have produced. Almost without exception, whenever a choice had to be made between justifying the pre-*Mapp* practice in terms of a post-*Mapp* rationale, the traditional concepts were stretched to accommodate police practice.

Where *Mapp* would require exclusion of evidence because a home was searched without a warrant, the courts strained to find consent for the search. The theory of abandonment of contraband became an ever more prevalent ingredient of probable cause. The point of the arrest receded further and further from the point of initial contact between citizen and officer, so that all activity after the initial contact could be utilized as the legal predicate for the arrest. The doctrine of probable cause was itself diluted to an often incredible degree.*

Finally, when it became clear that doctrine and practice could not be reconciled, the New York Court of Appeals abandoned the doctrine in *People v. Rivera*, 14 N.Y. 2d 441 (1964), cert. den. 379 U.S. 978 (1965).

* This case itself illustrates the extent to which legal principle is molded to insure that the products of a search are not suppressed. Initially the officer's sworn complaint was couched in terms of an abandonment theory. At the hearing, a theory of consent was advanced and rejected. The trial judge was at first disposed to grant the motion to suppress, but ultimately denied it by making a factually unsupported holding of probable cause, relying on information unknown to the officer before he made the search. The District Attorney was unable to support the probable cause finding on appeal, and turned to the stop-frisk rationale, which the Court of Appeals was compelled to utilize even though it was not advanced at the suppression hearing, since no other theory of admissibility remained.

The legislature was not inactive during this period. Its response to this problem was the enactment of Section 180-a of the Code of Criminal Procedure, which authorized the police to detain and question an individual where no basis for making an arrest existed, and to search the individual even though the traditional reason for making a search was absent.

The first opinion construing 180-a relied heavily on the rationale in *People v. Rivera, supra*, and held that the 'permissible search' following the 'stop' allowed under common law and section 180-a should be limited to a 'frisk'—a 'patting' of the exterior of one's clothing'. *People v. Peters*, 18 N.Y. 2d 238, 245 (1966). The second opinion construing 180-a was compelled to recognize that what police officers did in that case was to search and not to frisk. *People v. Taggart*, — N.Y. 2d — (1967).

In *People v. Taggart, supra*, the court of appeals was confronted with the choice between either adhering to its original limitation on a less-than-probable cause seizure, and by doing so, excluding the evidence, or enlarging the scope of the invasion of privacy to embrace a search in order to find the evidence admissible.

The court chose not to limit the invasion to a frisk but to expand the invasion to encompass a search. In so doing, it acknowledged that in all but one of the previous cases,* although it relied on a frisk concept, it actually was sanctioning searches. Thus the full swing from pre-*Mapp* to pre-*Mapp* was made.

It is obvious that the New York solution is a radical departure from existing constitutional law. We therefore deem it appropriate to assert that its proponents must at

* *People v. Rivera, supra*.

least be called on to answer these questions: Can the statute serve the dual function of, on the one hand, protecting the citizens' right to privacy and, on the other, the policeman's need to ferret out crime and for self protection as well as does the traditional standard—probable cause; especially since the traditional standard was itself fashioned in response to these same competing interests of law enforcement and privacy. And if, on balance, the traditional standard must be discarded, is this statute, embodying such a fundamental departure from precedent, the only means available to insure adequate criminal law enforcement and adequate protection for the police officer. *Berger v. New York*, 388 U.S. 41 (1967); *Miranda v. Arizona*, 384 U.S. 436, 479-491 (1966). While no court can decree that a legislature enact an alternate statute, the fact that alternative, less radical, solutions to the problem exist must be considered in determining the reasonableness of any particular solution when a state has legislated in a constitutionally protected sphere.

POINT I

Section 180-a Is Unconstitutional on Its Face Because It Authorizes an Unreasonable Search.

(1) THE STATUTE HAS BEEN CONSTRUED TO AUTHORIZE A SEARCH.

In *People v. Rivera*, *supra* at 446, and in *People v. Peters*, *supra* at 245, the conduct authorized by subsection (2) of the statute was construed to be a "frisk" of the person, as opposed to a "full blown search," and was defined as a "contact or patting of the outer clothing of a person to detect by the sense of touch if a concealed weapon is being carried".

Although no majority opinion was written in this case, from an analysis of the opinion in *People v. Taggart*, *supra*, it is clear that Section 180-a(2) was construed to authorize a search, in line with the literal words of the statute. In *Taggart*, the New York Court of Appeals held that the conduct of the police officer in that case was a search not a frisk (— N.Y. 2d at —) and that "under the literal language of the statute, then, [the officer's] 'search' of defendant was justified." — N.Y. 2d at —. The New York Court of Appeals went on to point out that "in all but one of [its] decisions on this point, the arresting officers engaged in 'searches' rather than 'frisks' in order to obtain inculpatory evidence" (— N.Y. 2d at —); and hence there was "ample authority to uphold the legality of the search in this case." (— N.Y. 2d at —)

* The exception was *People v. Rivera*, *supra*.

After the decision in *Taggart*, there is no need to assume that the only conduct authorized by 180-a(2) is merely a lesser infringement of the right to privacy than a 'full blown search.'* The *Rivera-Peters* construction, limiting 'search' to 'frisk', was formally abandoned in *Taggart*. The conduct authorized by section 180-a(2) is a search, because the New York Court of Appeals has construed the word 'search' in the statute to mean search.

- (2) THE 'SEARCH' AUTHORIZED BY SECTION 180-a(2) CAN BE MADE ON A STANDARD LESS THAN PROBABLE CAUSE TO BELIEVE THAT A CRIME IS BEING OR HAS BEEN COMMITTED.

The standard contained in Section 180-a governing when the 180-a(2) 'search' can be made has been construed to permit the search where no probable cause exists.

In *People v. Peters*, 18 N.Y. 2d at 246, the New York Court of Appeals stated:

"Since a frisk . . . is less of an invasion than a full search, it is just that such a frisk may be warranted upon grounds which would not sustain a full search—i.e., grounds less than probable cause."

See also *People v. Peters*, *supra* at 244-5; *People v. Pugach*, 15 N.Y. 2d 65, 69 (1964), cert. den. 380 U.S. 936 (1965); *People v. Rivera*, *supra* at 446, 447; and *People v. Taggart*, *supra* at —.

Section 180-a on its face contains two limitations on the policeman's power to search—first, that the officer must reasonably suspect the person is committing, has committed or is about to commit a felony or any of the crimes

* Cf. *Time, Inc. v. Hill*, 385 U.S. 374 (1967).

specified in Section 552, and second, that he must reasonably suspect that he is in danger of life or limb.

The second limitation—reasonable suspicion of danger—was construed in *People v. Peters, supra* at 245:

"In addition to the detention which is authorized, the officer is allowed to frisk the suspect if he reasonably suspects that he is in danger of life or limb. Again the standard is the reasonable suspicion of the officer."

The court defined reasonable suspicion as:

" * * * 'reasonable suspicion' requires satisfactory grounds for *suspecting* that a crime was committed. The difference between these two standards [probable cause and reasonable suspicion] is proportionate to the differences in degree of invasion between an arrest and a detention, between a full search and a frisk."
18 NY 2d at 246-247 (emphasis in original).

- (3) THE STATUTE AUTHORIZES A SEARCH FOR ANY ITEM CARRIED BY THE INDIVIDUAL WHO IS STOPPED, AND HAS BEEN CONSTRUED TO AUTHORIZE THE INTRODUCTION OF ANY ITEM FOUND ON HIM OR IN HIS CONTROL INTO EVIDENCE IN A CRIMINAL PROSECUTION.

On its face, the statute authorizes the officer making the search to take any item from the person "the possession of which may constitute a crime". The New York Court of Appeals has construed the statute to authorize the taking of narcotics (*People v. Sibron, supra*) and of burglar's tools (*People v. Peters, supra*) as well as the taking of weapons, and has further construed the statute to authorize the use of any of these items in a criminal

prosecution even though the item was seized in cases where the policeman effecting the search had no probable cause to believe that a crime was being or had been committed.

One of the issues to be decided on this appeal is whether a state by statute can authorize a search for any item illegally possessed on the person, or in his control as in *Pugach*; who is in the street, as in *Rivera* and *Taggart*; in a restaurant as in *Sibron*; in custody in a police car, as in *Pugach*; or in the hallway of a private residence, as in *Peters*, where the officer makes the search to discover the illegally possessed item absent probable cause to believe a crime has been or is being committed, and can further authorize the admission of this evidence in a criminal prosecution.

- (4) THE STATUTE IS UNCONSTITUTIONAL BECAUSE IT AUTHORIZES A SEARCH FOR EVIDENCE OF CRIME ON A STANDARD LESS THAN PROBABLE CAUSE.

The Fourth Amendment is a restraint upon the power of the government to interfere with the citizen's right to the privacy of his property and where a search of the individual is conducted, with the integrity of his person.

"What the Fourth Amendment protects is the security a man relies upon when he places himself or his property within a constitutionally protected area . . . There he is protected from unwarranted governmental intrusion. And when he puts something in his filing cabinet, in his desk drawer, or in his pocket, he has the right to know it will be secure from an unreasonable search or an unreasonable seizure."

Hoffa v. United States, 385 U.S. 293 (1967).

"The basic purpose of this Amendment, recognized by countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials. The Fourth Amendment thus gives concrete expression to a right of the people which 'is basic to a free society' [citation omitted]."

Camera v. Municipal Court, 387 U.S. 523, at — (1967).

The government's power to invade the citizen's privacy is limited even though "the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen" (*Camera v. Municipal Court*, *supra*, at — is the interest of criminal law enforcement. The fact of crime and the existence of criminals does not, *ipso facto*, justify an official intrusion upon privacy. This is graphically recognized in *Camera* at —:

"For example, in a criminal investigation, the police may undertake to recover specific stolen or contraband goods. But that public interest would hardly justify a sweeping search of an entire city conducted in the hope that these goods might be found."

The panorama of history behind the Fourth Amendment is the proof of these statements. The primary, if not the sole purpose of the Fourth Amendment, was to eliminate centuries of abuses and invasions of personal liberty and security, caused by the widespread use of writs of assistance and general warrants. Landynski, *SEARCH & SEIZURE AND THE SUPREME COURT* (1966),*

* Hereafter cited as "Landynski".

19-48; *Search and Seizure in the Supreme Court: Shadows on the Fourth Amendment*, 28 U. of Chi. L.R. 664 (1961); *Boyd v. United States*, 116 U.S. 616, 626-628 (1886); *Weeks v. United States*, 232 U.S. 383, 390-391 (1914); *United States v. Rabinowitz*, 339 U.S. 56, 69-71 (1950) (Frankfurter, J., dissenting).

The fact of sedition, a threat to the existence of government itself—did not justify a sweeping search for the author of the seditious material. *Entick v. Carrington*, 19 Howell's State Trials 1029 (1765). The existence of contraband pirated into a city without payment of legally imposed taxes was deemed insufficient justification for a general warrant. Landynski, at 31.

In short, the Fourth Amendment embodies the idea that the right of the citizen to be left alone is a more significant value than is the need for the government to enforce its laws. Even so, the Fourth Amendment does not make "the precincts of the home or office . . . sanctuaries where the law can never reach" *Berger v. New York*, *supra* at —. The right to be left alone does yield to the need of criminal law enforcement where a constitutional standard for official invasion has been met. That standard is probable cause and is often reiterated but nowhere more succinctly put than in *Brinegar v. United States*, 338 U.S. 160, 175-6 (1948):

"Probable cause exists where the facts and circumstances within his [the officers] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed."

The standard of probable cause is the historically achieved tool for reconciling the state's need to enforce its laws with the citizen's right of privacy. In not requiring the police to possess actual knowledge before they act, it does not tie the hands of law enforcement, but in requiring more than the bald suspicion that crime exists, it prevents arbitrary invasions of privacy. *Brinegar v. United States*, 338 U.S. at 176.

Probable cause is the only standard ever utilized to determine whether a breach of privacy in the interest of criminal law enforcement is reasonable. This Court has consistently and steadfastly adhered to the probable cause standard in all cases involving breaches of privacy in the interest of criminal law enforcement.*

While some of the earlier American and English cases have spoken in terms of "reasonable suspicion", these words have historically been the equivalent of probable cause. For instance, in *Lund v. DuPont*, 3 Wash. 37, the definition was made in this fashion:

"A reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the party is guilty of the offense with which he is charged."

*In *Camera v. Municipal Court*, *supra*, this Court was careful to state that while other governmental interests may justify an invasion of privacy upon a different standard, this did not endanger the "time-honored doctrines applicable to criminal investigations." This holding marks no departure from precedent. The idea that governmental interests other than criminal law enforcement could justify searches on a different standard than probable cause was recognized in *Carroll v. United States*, 267 U.S. 132 at 154 (1924), where Chief Justice Taft stated that while border searches might be made without a specific showing of probable cause because of the requirements of national self protection, searches for contraband within the country could only be made upon probable cause.

See also: *Ulmer v. Leland*, 1 Me. 135 (1820); *Stacey v. Emery*, 97 U.S. 642 (1878).*

Although the relationship between the first and second clauses of the Fourth Amendment has caused conflict,** no case has ever held that because an officer could, constitutionally, act without a warrant, he was thereby justified in acting without probable cause.

Under one interpretation of the interrelationship between the clauses, a warrant can be dispensed with only in narrow exceptions arising out of emergency circumstances.† A warrant was considered the *sine qua non* of the reasonableness of the search.

Only two situations, both based on necessity, were recognized in which warrantless searches were held reasonable—

* When the Uniform Arrest Act was adopted in the state of Delaware, the term "reasonable ground to suspect" was construed by the highest Delaware court as the equivalent of probable cause (*DeSalvatore v. State*, 52 Del. 550, 163 A. 2d 244 [1960]):

"We can find nothing in (section 2 of the Act) which infringes on the rights of a citizen to be from detention except as appellant says, 'for probable cause'. Indeed, we think appellant's attempt to draw a distinction between an admittedly valid detention upon 'reasonable grounds to believe' and the requirement of (section 2) of 'reasonable grounds to suspect' is a semantic quibble. . . . In this context the words 'suspect' and 'believe' are equivalents."

See also *Wong Sun v. United States*, 371 U.S. 471, 478 n. 6 (1962) and *Draper v. United States*, 358 U.S. 307, 310 n. 3 (1959) defining the term "reasonable suspicion" as used in 26 U.S.C. §7607.

** *Search and Seizure in the Supreme Court: Shadows on the Fourth Amendment*, 28 U. of Chi. L. Rev. 664, *supra*.

† See dissenting opinions in *United States v. Rabinowitz*, *supra*; *Harris v. United States*, 331 U.S. 145 (1947); *Davis v. United States*, 328 U.S. 582 (1946) and *McCray v. Illinois*, 386 U.S. 300 (1967); also majority opinions in *Weeks v. United States*, *supra*; *Marron v. United States*, 275 U.S. 192 (1927) and *Trupiano v. United States*, 334 U.S. 699 (1948).

the search incident to an arrest and the search of a moving car.

Historically, under the early English and American cases, an officer had a right to arrest without a warrant if he had probable cause to believe that a felony was committed. Concomitant with the right to arrest, was the right to conduct an incidental search as a purely protective device and also to avoid destruction of the evidence by the arrested person, *Landynski*, at 98; *Abel v. United States*, 362 U.S. 217, 236 (1960).

The early decisions of this Court explicitly recognized that the sanctioning of the right to search as the incident of a valid arrest had deep-rooted origins in the common law and were based on necessity.

The second exception recognized, the search of the moving car, had no common law origins, but was still based upon a modern necessity. The advent of the automobile caused radical changes in our society, and the new mobility and speed it gave to criminals confronted law enforcement with grave difficulty in apprehending contraband. But even the enormously increased ability of the criminal to transport contraband goods did not cause the Congress or this Court to sanction searches of automobiles on a standard less than probable cause. While the increased speed and mobility obviated the need for a warrant to search the automobile for contraband because of the necessity of acting quickly:

"It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor and thus subject all persons lawfully using the highways to the incon-

venience of indignity of a search. Travellers may be stopped in crossing an international boundary because of national self protection reasonably requiring one entering the country to identify himself as entitled to come in and his belongings as effects which may be lawfully brought in. But those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise."

Carroll v. United States, 267 U.S. at 153-4.

In *Brinegar*, this Court not only reiterated that the *Carroll* decision permitting the warrantless search of the automobile* was predicated upon a finding of probable cause (338 U.S. at 177) but cautioned that:

"to require less would be to leave law-abiding citizens at the mercy of the officer's whim or caprice." 338 U.S. at 176.

In *United States v. Rabinowitz*, 339 U.S. at 66 this Court enunciated the second construction of the interplay between the first and second clauses of the Fourth Amendment. Under this interpretation:

"The relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable."

* The opinion never sought to justify the search as incident to an arrest.

While this construction created controversy as to the scope of the search incident to an arrest (contrast *Harris v. United States*, *supra*, with *Warden v. Hayden*, 387 U.S. 294 [1967]), it did not affect the fundamental requirement that no incidental search was permissible unless probable cause for the initial breach of privacy—the arrest—existed.*

Furthermore, notwithstanding the *Rabinowitz* decision, this Court has continually stressed that it is preferable to interpose the magistrate between the policeman and the citizen. (*Jones v. United States*, 362 U.S. 257 (1960); *Chapman v. United States*, 362 U.S. 610 (1961); *United States v. Ventresca*, 380 U.S. 102, 106-109 (1965)) and that the standard for a warrantless search is at least as stringent as that for a warrant. *Wong Sun v. United States*, 371 U.S. at 479; *Beck v. Ohio*, 379 U.S. 89, 96 (1964).

While the states have been given freedom to develop workable rules governing arrests, searches, and seizures to meet the practical demands of effective criminal investigation, such rules cannot “violate the constitutional proscription of unreasonable searches and seizures and the concomitant command that evidence so seized is inadmissible against one who has standing to complain.” *Ker v. California*, 374 U.S. at 34.

No decision of this Court has ever held that there is freedom to diminish the requirement of probable cause, and to admit into evidence the product of a search made on a lesser standard.

Beyond history and the decisions of this Court, the reason for this is that probable cause embodies the rational

* *Beck v. Ohio*, 379 U.S. 89 (1964); *Henry v. United States*, 361 U.S. 98 (1959); *Ker v. California*, 374 U.S. 23 (1963); *Wong Sun v. United States*, *supra*.

balance between the competing values of privacy and criminal law enforcement and, as such is the constitutional test of reasonableness commanded by the Fourth Amendment's assurance of the right of the people to be secure in their persons and effects. Since the statute discards the standard and destroys this balance, it must be declared unconstitutional.

(5) PROBABLE CAUSE IS THE ONLY VIABLE STANDARD TO ASSURE THE CITIZEN'S RIGHT OF PRIVACY.

That which has always been, either stands up to rational analysis or yields to a more compelling rationality. The rationality and hence the validity of probable cause as the constitutional test of reasonableness is the fact that it works well. It is objective—police can understand it, and courts can apply it. It strikes a reasonable balance between police necessity and privacy. It does not prohibit the police from acting in cases where they do not have sufficient evidence to establish a *prima facie* case. *United States v. Burr*, 25 Fed. Cas. 2, 12 (No. 14,692a) (C.C.D. Va., 1807). It permits police action on the probability that the individual under consideration has broken the law, rather than only where criminality can be established to a certainty. Yet in requiring the policeman to act on information leading him to believe it is probable that an illegal act has occurred, the standard restrains him from acting upon mere suspicion, speculation, conjecture or surmise. Courts can determine whether, from the facts and circumstances known to the officer, it was probable for him to conclude a crime had been or was being committed, or whether he acted precipitously, upon mere suspicion.

The probable cause formula is not rigid—it permits action upon information not perceived personally by the of-

ficer (*Draper v. United States, supra*; *McCray v. Illinois, supra*), and upon information within his particular expertise—*Johnson v. United States*, 333 U.S. 10 (1948); *Brinegar v. United States, supra*; *Carroll v. United States, supra*). It might allow him to calculate the seriousness of the offense under investigation as one factor in justifying his response to it though this has never been a majority view (see dissent of Jackson, J., in *Brinegar, supra*) and it does permit him to take the risk of danger into consideration. (*Warden v. Hayden, supra.*) While the particular decision as to what facts constitutes probable cause in any given case may vary, the basic objective framework within which the decision is made never changes.

In permitting action upon probability rather than certainty, the standard recognizes the needs of law enforcement and meets that need. But in requiring probability rather than suspicion, the probable cause standard insures the right of a free people to be untroubled by officious, unwarranted meddling. While it is tolerable for a policeman to draw blood from the body of one as to whom he concludes, from the facts and circumstances, is a drunk driver, it would be intolerable to permit this same act upon any person driving from a tavern on New Year's eve. While it is tolerable for a policeman to arrest Entick for sedition if the facts and circumstances known to a reasonable man of prudence and caution warrant him in the belief that Entick has authored seditious literature, it is intolerable for him to arrest 47 persons who are suspected of uttering sedition because sedition has been published.

A good faith belief in one's suspicions cannot substitute for a calculation based upon the probability that one's

suspicious are well-founded. To trust good faith is to build the constitutional assurance of freedom from arbitrary official action upon sand. No witch was ever put to the rack except on the good faith of the churchly inquisitor who tightened the screw. Trevor-Roper, *Witches and Witchcraft*, ENCOUNTER, Vol. XXVIII, Nos. 5 and 6 (1967).

Probable cause has been the historic, traditional test of reasonableness not because it is some quaint, legal anachronism maintained only through the dead weight of precedent, but because it gives life to the principle that the right of personal liberty and the necessity of law enforcement can be made to co-exist together in a workable harmony. It remains to be shown whether the new standard created by section 180-a achieves this same kind of balance.

We submit that the statute cannot strike a reasonable balance: that it will destroy the right to privacy because, first, the standard it employs is vague and unworkable; second, the standard it employs is an invitation to evade the more stringent standard of probable cause; third, the statute cannot be confined to the apparently narrow purpose of police self-protection which its proponents say it was designed to achieve; and finally, that other, less drastic measures are available which will safeguard the police and which do not destroy the sense of dignity and freedom with which the law abiding majority walk the streets.

(6) REASONABLE SUSPICION IS NOT A VIABLE STANDARD UPON WHICH TO AUTHORIZE A SEARCH.

The construction of reasonable suspicion, as given in *Peters, supra*, and its use in the various cases applying it,

leads to the conclusion that the only possible conduct not held reasonably suspect is the perfectly normal.

The standard is non-objective and vague and places primary reliance upon the intuitive assessment of the police officer. Because it is non-objective and vague, it cannot be applied by the courts to curtail arbitrary police action. Because it does not act as a check upon arbitrary police action, it does not strike a reasonable balance between the necessities of law enforcement and the citizen's right to privacy.

In *Peters*, 18 NY 2d at 245, the court stated:

"By requiring the reasonable suspicion of a police officer, the statute incorporates the experienced police officer's intuitive knowledge and appraisal of the appearances of criminal activity. *His evaluation* of the various factors involved insures a protective, as well as definitive, standard." (emphasis added)

In relying on *his* evaluation to protect *our* right of privacy, the standard makes the policeman the judge of our rights. This is the very evil the Fourth Amendment was adopted to prevent.

"The right to privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals."

McDonald v. United States, 335 U.S. 451, 455 (1948).

The standard is non-objective and vague because once the judicial focus is shifted from assessing the probability that a crime had been or is being committed to assessing the reasonableness of the officer's suspicion, then the court

need only assume that the police officer acted in good faith in order to sustain the search. What court can know whether a policeman reasonably suspected he was in danger of his life? What criteria can be employed to make such a determination? Either the policeman's own subjective assessment of the danger to his person is accepted, or the court must hold that the officer was overcautious in protecting himself.

From the decisions of the New York Court of Appeals it is highly unlikely that a court will find that an officer overreacted to his own perceived assessment of danger. In fact, in *People v. Rivera*, 14 N.Y. 2d at 446, the court conceded:

"If we recognize the authority of the police to stop a person and inquire concerning unusual street events *we are required* to recognize the hazards involved in this kind of public duty. The answer to the question propounded by the policeman *may be a bullet; in any case* the exposure to danger *could be very great.* (emphasis added)

From this perspective, the answer to any question *could* be a bullet—even the most mild-mannered of men may be a potential killer—and given that assumption, what situations are left where no bullet may be expected and where no 'frisk' can be made?

In *Rivera*, the lateness of the hour and the high incidence of crime in the neighborhood justified the 'frisk.' The officer, who was in the company of two fellow officers, testified that while he was apprehensive because of these things, he was not in fear of being attacked.*

* Record on appeal, *People v. Rivera*, p. 32, (certiorari denied, 379 U.S. 978).

In *Pugach*, a search of the defendant's briefcase was justified even though the defendant was in a police car between two police officers. In *Peters*, the search was justified because it took place "in the narrow confines of a stairway", with a second suspect "still on the loose" and *although the officer was armed with his gun and had the suspect by the shirt collar*, "in such a situation the tables are easily turned." Here the search of Sibron was justified although the officer had observed him for eight hours without seeing any criminal conduct and where the officer unhesitatingly commanded the defendant to reach into his own pocket..

In *People v. Taggart, supra*, the fact that the suspect "was standing in the middle of a group of children that had just finished bowling" was sufficient justification for a full blown search since there had been an anonymous tip he was armed and "the presence of the suspect among a group of children is a particular circumstance suggesting that the occasion was not one in which a preliminary interrogation and perhaps a limited frisk before search was indicated, if the safety of the children or the police officer was to be respected."

In the cases where the reasonable suspicion formula is employed, the courts again and again feel themselves compelled to accept the officer's assessment of the danger inherent in the situation.

In *People v. Reason*, 52 Misc. 425, 429 (S. Ct. N.Y. Co., 1966), the court states:

"It would be fatuous, in my opinion, to conclude that a police officer detaining a suspected thief would be

foolish enough not to search the suspect for weapons. The notion that the thieves might be armed is not so far-fetched that it would be unreasonable, in my judgment, for an officer to search a person, suspected of burglary and larceny, for weapons."

In *State v. Terry*, 50 Ohio App. 2d 122, 214 N.E. 2d 144, 120 (1966) No. 1161, O.T. 1967, the court, concluding that frisking must be allowed when a stop is permitted ("are we to allow him [the officer] the right of inquiry and then, when this right is exercised, reward him with an assailant's bullet?"), *assumes* it will be done in good faith since,

"police officers seem unanimous in stating that 'frisking' is done for self-protection and not as a mere evidentiary 'fishing expedition'."

Since the police officer, who had 39 years experience, thought the defendant was "casing a store with robbery in mind", it was also logical for the officer to assume that the defendant was armed and dangerous.

What situations are left where no search can be made?

"Where a person's activities are perfectly normal, he is fully protected from any detention or search." *People v. Peters*, 18 NY 2d at 246.*

* This is echoed in *Williams v. State*, 222 N.E. 2d 397 (S.Ct. Ind., 1966):

"The appellant argues that it is not against the law to have large sums of money and to carry them in such a fashion. It is possible that a person could carry money such as this without having committed a crime. However, if a person chooses to behave in so unconventional a manner, he has no absolute right to be free from reasonable 'inquiry'."

But what is "perfectly normal" under a standard which "incorporates the experienced police officer's intuitive knowledge and appraisal of the appearances of criminal activity" (Peters, at 245) and which relies upon the officer's "evaluation of the various factors involved [to] insure a protective, as well as definitive, standard." (Peters at 245).

As one commentator* has observed:

"And Mr. Justice Jackson's distrust [of the policeman's judgment] was sound, for police judgment is not likely to be overly discriminating. Recent field studies by Skolnick, the American Bar Foundation, and many others have catalogued the many innocent events that are suspicious to a policeman. These studies and police training materials like Bristow's *Field Interrogation* point up the underlying principle of these judgments: anything out of the ordinary is suspicious. Because of the element of danger in his work, 'the policeman is generally a "suspicious person"; he must be suspicious of strangers, oddity, indeed any sort of change'. It is the nature of the policeman's situation that his conception of order . . . is . . . shaped by persistent suspicion . . . [A] young man may suggest the threat of violence to the policeman by his manner of walking or 'strutting'." **

* Schwartz, "Stop and Frisk" in New York and In Practice: A Case Study in the Judicial Abdication of Control Over the Police (unpublished manuscript).

** For a more colloquial appraisal, see Pileggi, *The Long Palm of the Law*, ESQUIRE, April, 1967, p. 132:

"Suspicion and distrust are basic police characteristics. Police-men are trained from their very first day to distrust everyone, to look for angles, suspect motives, see through tears, sadness

Perfectly normal is what appears perfectly normal to a policeman, so that if a person can make his conduct on the street conform to the policeman's conception of normal conduct, he is protected from a search. If he won't conform to the policeman's norm, or if he *can't* conform (because he is a negro in a white residential area* or a Puerto Rican walking in front of a bar in a high crime neighborhood**), then he is not protected from a search.

The only way to avoid being searched under the standard of reasonable suspicion is to be perfectly normal in the eyes of the policeman. Under this test, what is left of the Fourth Amendment right to privacy?

Since nothing is left, the statute must be declared unconstitutional.

- (7) IN ADDITION TO ITS VAGUENESS, THE REASONABLE SUSPICION STANDARD WILL ULTIMATELY DESTROY THE PROBABLE CAUSE STANDARD.

In the 16th century, Sir Thomas Gresham formulated a principle that has come to be known as Gresham's law. It was formulated in this manner: "if two currencies are both legal tender and one is cheaper than the other, the cheap money drives out the dear."

and hysteria. Policemen are trained to see in every weeping widow a murderess, in every burgled merchant, an insurance thief, in every doctor robbed of narcotics, an addict."

* Field Surveys IV, *The Police and the Community*, A REPORT OF A RESEARCH STUDY SUBMITTED TO THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE (1966) (referred to hereafter as Field Surveys IV, Vol. I) Vol. I, page 142: "The Negro driving his family in an all white neighborhood and the racially mixed couples are pointed to as particular targets of the field investigation."

** *People v. Rivera, supra.*

The analogy to creating a less stringent standard than probable cause and permitting both standards to justify a search for any evidence upon the person of the suspect is striking. If the police are permitted to search on a lesser standard, there is a real danger they will never govern themselves according to the greater standard. In order to insure that the 'protective' search on suspicion is not used as a device to evade the restrictions imposed on the traditional search, it should not be permitted at all.

Judge Fuld very cogently expressed this inherent potential for abuse in his dissenting opinion in *Peters*:

"In authorizing such a search (on suspicion), section 180-a of the Code of Criminal Procedure represents more than a green light to abuse. As well illustrated by the present case, and even more graphically by *People v. Sibron* (infra, p. 603, also decided today), the statute is an outright invitation to evade the constitutional prohibition against unreasonable searches and to circumvent the exclusionary rule of *Mapp v. Ohio* (367 U.S. 643)." (18 N.Y. 2d at 249)

See also, *Task Force Report: The Police*, THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE (1967), p. 186.

The very nature of a dual basis for admissibility of evidence carries in itself the real probability that the more stringent standard will never be utilized, just as the nature of a dual monetary standard creates the probability that no one will spend gold if he can buy the same commodity with devaluated paper money.

The statute is an invitation to abuse in two respects: first, it is amorphous and vague (*supra*, pp. 25-31) and

second, the end result of creating a dual standard will be to eliminate the search on probable cause.

Unless this Court is willing to abandon the time-proven balance that probable cause achieves between the right of privacy and the necessity of law enforcement, the reasonable suspicion standard must be declared unconstitutional.

(8) SECTION 180-a CANNOT BE CONFINED TO THE PURPOSES FOR WHICH IT WAS ENACTED. MOREOVER OTHER METHODS ARE AVAILABLE WHEREBY THE POLICE MAY PROTECT THEMSELVES BUT WHICH WILL SAFEGUARD THE POLICE WITHOUT DESTROYING THE SENSE OF DIGNITY AND FREEDOM WITH WHICH THE LAW ABIDING MAJORITY WALK THE STREETS.

If this Court is ready to permit a protective search on a standard less than probable cause, we submit the only way the balance between the citizen's right of privacy and the officer's need for self-protection can be preserved, is to exclude all the evidence seized in the course of such a protective search. The reason for exclusion is that it is impossible to confine the protective search on reasonable suspicion to the single purpose for which it should be made unless the incentive to use it as a pretext for a general search of the person is removed.

Once the right to frisk is recognized, three possible situations exist after a suspect is stopped on less than probable cause:

- (1) the suspect does something that causes the police officer instinctively to believe he is in danger, i.e. which gives him "reasonable suspicion," but which does not give him probable cause to believe he will be assaulted with a deadly weapon;

- (2) the suspect does nothing, but because there is no way of knowing if he is dangerous, the officer frisks because "the answer to any question propounded may be a bullet";
- (3) the suspect does nothing, but a frisk is made anyway because an arrest and search would not result in evidence that could be introduced in court.

The first situation is one where the exclusionary rule poses no problem to the officer—realistically speaking, he will frisk to protect his life no matter what a statute authorizes or what the court decisions say. His instinct for self-preservation will dictate his course of action. But the exclusionary rule does present a problem to the admissibility of the evidence, under the traditional test of admissibility, the evidence must be excluded.

The second situation presents a different kind of problem. Do we allow the existence of the exceptional situation to dictate the practice in the routine situation? The weight of the social-scientific exploration of this problem is against such an answer. While the answer to the question may be a bullet, knife or razor blade, and while it is important to protect the policeman, what is the effect on the citizen who is subjected to a,

"... check [of] the subject's neck and collar. A check should be made under the suspect's arm. Next a check should be made of the upper back. The lower back should also be checked.

A check should be made of the upper part of the man's chest and the lower region around the stomach. The belt, a favorite concealment spot, also should be checked. The inside thigh and crotch area should also

be searched. The legs should be checked for possible weapons. The last items to be checked are the shoes and cuffs of the subject . . ."

whenever he is stopped and questioned. Moynahan, **POLICE SEARCHING PROCEDURES**, 7 (1963).

The individual suffers an affront to his dignity, which causes a deterioration of the human spirit. As Justice Jackson stated in *Brinegar v. United States*, 338 U.S. at 180-181 (dissenting opinion):

"Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government. And one need only briefly to have dwelt and worked among the people possessed of many admirable qualities but deprived of these rights to know that the human personality deteriorates and dignity and self-reliance disappear where homes, persons, and possessions are subject at any hour to unheralded search and seizure by the police."

Moreover, the routine use of the frisk has the effect of breaking down police-community rapport. "A community's attitude toward the police is influenced most by the action of individual officers on the street". *Task Force Report: The Police, supra* at 178. What attitude other than hostility and hate can be expected if every stop is accompanied by the kind of laying on of hands that a frisk entails? Should this practice be encouraged by admitting the evidence discovered by the frisk? Or should it be discouraged by excluding the evidence?

The third situation is the logical extension of the second. If the answer to every question may be a bullet, and if a

frisk is therefore permitted in any situation where a stop is made (*People v. Rivera, supra*), and if the evidence is admissible, then how can a court ever determine when the frisk is being used as a subterfuge? No policeman is going to admit that he frisked simply because he couldn't search and not because the answer to his question might have been a bullet, and no defense attorney, no matter how skilled in the art of cross-examination, will ever be able to establish this. And what court, no matter how slight the suspicion, informed by hindsight and judging after the event would be willing to say that the suspicion was insufficient or that the suspicion was unobjective.

The evidence must be suppressed in all the situations posed in order to prevent the exceptional reason for finding the evidence admissible (the officer's good faith search for self protection) from becoming the general test of admissibility. This Court cannot approve the practice wholesale merely because the policeman will do it anyway when he instinctively feels it is necessary.

This Court has consistently warned against grafting exceptions on constitutional rights. The attitude of this Court regarding such exceptions was perhaps best expressed by Mr. Justice Bradley:

"It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed."

Boyd v. United States, 116 U.S. at 635.

But what about the first situation: if the police are going to frisk to protect themselves when they instinctively feel it is necessary, must the courts be put in the awkward position of excluding the evidence and thereby saying to the individual officer, you acted illegally even though your instinct for self-preservation told you you were acting justifiably.

This dilemma is not a real one because it stems from a misconception of the nature and purpose of the exclusionary rule. The exclusionary rule was not designed to punish the blunder of the individual constable, but rather as the means to obtain broad executive compliance with the Fourth Amendment restraint on unreasonable official action.* The danger to the right of privacy stems not from the isolated act of an individual policeman, but from the policy of his superiors. Landynski, at 123, 184-5. The exclusionary rule is applied because in order to make an effective record of criminal convictions, law enforcement agencies must avoid conduct which imperils successful prosecution (Landynski, at 85)** and also because no other

* As pointed out in Report and Recommendations of the Commissioner's Committee on Police Arrests for Investigation, District of Columbia, 1962, page 52 (hereafter cited as the Horsky Report); the existence of the Judges Rules in England, even though they are violated on occasion by the police, show that the authorities believe crime can be controlled without resorting to illegality, even though the individual constable, on occasion, does not. See also Landynski, at 78.

** The proof of this in the related area of illegal confession is contained in Field Surveys IV, Vol. I, page 134:

"It is noteworthy that nowhere in the findings of this study, were allegations of the falsification of evidence or forcible extraction of admissions and confessions advanced by any person interviewed, nor were they otherwise suggested by observation and investigation. *It can be assumed, however, that the high judicial standards which prevail today would make the exer-*

method is available for securing broad executive compliance with Fourth Amendment restrictions upon criminal law enforcement. *Mapp v. Ohio*, 367 U.S. at 654. By excluding the evidence in the first situation in order to prevent the second and third situations from developing, the court is not branding the individual officer an outlaw, but is insuring that a defensive measure will not be converted into a widespread, systematic officially sanctioned invasion of the right to privacy, and is further, setting the positive standards to which heads of law enforcement agencies will conform the practices of their men.*

Punishment of individual acts of misconduct should be left to supervisory agencies within the community, whether they be review boards or ombudsmen or even civil courts which sit to determine whether monetary judgments for false arrests or civil rights violations should be awarded against the individual policeman. But the decision to admit or exclude evidence cannot be employed to vindicate the good faith of the individual policeman** when to utilize it for this end entails the grave probability that all judicial control over unreasonable invasions of the right of privacy will be forfeited.

cise of the unconstitutional acts meaningless in the accomplishment of the police purpose. Accordingly it is not expected that any law enforcement agency would subscribe to technical practices which may have been more common in earlier times."

* "Begrudging adherence to the letter of due process [by the policeman] may have a different social effect than willing, wholehearted acceptance. Much of the latter is dependent, of course, upon the top leadership of the Department. These high-ranking officials set the administrative and organizational tone and style with which the police mission is accomplished." *Field Surveys IV*, Vol. 1, p. 136.

** "This officer is deserving of our highest praise", *People v. Peters*, 18 N.Y. 2d at 246.

We have no qualms about stating that the officer should be free from civil liability or administrative reprimand when he has acted in good faith but of a sense of self-protection. But we do challenge the good faith of a statute which because of its standard, nullifies the balance between privacy and law enforcement which the Constitution demands.

The policeman can achieve his need for self-protection, which is the professed reason for 180-a(2), without endangering the Fourth Amendment right to privacy. A state could allow him to assert his good faith, reasonable intuitive suspicion as a defense in a civil or administrative proceeding. But we feel we have demonstrated above that to allow evidence seized on less than probable cause even where the officer makes the search in good faith, is inevitably to abrogate the Fourth Amendment right to privacy.

In sum, reasonableness has always meant probable cause where a search was authorized. Probable cause has survived the test of time because it can accommodate the day to day needs of law enforcement while protecting the right of privacy. Reasonable suspicion is a standard less than probable cause. It does not strike a balance because it is vague, intuitive and subjective. It cannot co-exist with probable cause, since the existence of a lesser standard authorizing the same conduct as a stricter standard inexorably results in the death of the stricter standard. The limited purpose of protecting the officer who searches in the heartfelt need of self-protection can be accomplished by other, less risk-laden, alternatives than by a statute authorizing the introduction into evidence of all items seized in the course of a self-protective search. For all these reasons, section 180-a is unconstitutional.

POINT II

Section 180-a Is Unconstitutional on Its Face Because It Authorizes an Unreasonable Seizure of the Person.

(1) CONSTRUCTION OF THE STATUTE AS TO THE MEANING OF THE WORDS, 'STOP' AND 'DEMAND',

The literal words of Section 180-a(1) are:

"A police officer may stop any person abroad in a public place * * * and may demand of him his name, address and an explanation of his actions."

In *People v. Peters, supra*, at 241, the word "stop" was construed to authorize the following conduct: "Officer Lasky apprehended defendant." The "apprehending" was effected in this manner: Lasky pointed his gun at the defendant and held him by the shirt collar. Record on Appeal, pp. 20-21.

While doing so, Lasky "asked him [the defendant] what he was doing in the building. Defendant claimed to be looking for a girlfriend but refused to identify her because she was a married woman. Unimpressed with Defendant's apparent chivalry, Lasky brought him to the fourth floor * * *." 18 NY 2d at 241. This sequence of events was characterized by the Court of Appeals as "the limited intrusion of asking one for an explanation of his actions." 18 NY 2d at 243.

The New York Court of Appeals in *People v. Taggart, supra*, characterized the officer's action in the instant case as "the temporary detention of a suspect." — NY 2d —. This temporary detention consisted of the following: the uniformed officer interrupted the appellant's

meal in a restaurant (R. 8) asked him to accompany him outside (R. 16) and when appellant complied (R. 19), said to him without preliminary questioning "you know what I am looking for" (R. 18). The appellant, in response, reached into his pocket.

In *People v. Taggart, supra*, the officer " * * * took him [Taggart] by the arm and put him against the wall." This action was characterized as "the 'detention' involved in the instant case." — NY 2d at —.

The components which emerge from this are the following: In all three cases an officer of the law restrained the liberty of locomotion of the individual or his ability to do what he wished to do.

In two cases the restraint was effected by means of force, specifically, laying on of hands on the body and the use of a gun.

In the third case, *Sibron*, the interruption of the person's activity (sitting in a restaurant eating pie) and the restriction on his ability to do what he wished, i.e. to remain in the restaurant, was effected by "overcom(ing) (him) by a show of authority" (R. 19).

In *Peters*, the defendant was made to justify his conduct verbally, and the explanation was rejected.

In this case, the officer demanded that the appellant incriminate himself, which he did, not verbally, but by conduct.

These kinds of restrictions are not merely "something of an invasion of privacy", (*Peters*, at 245, quoting *Rivera* at 446) they are gross invasions of privacy. This is not a mere 'stopping to inquire'; it is a forcible restraint for the purpose of compelling the person to account for him-

self. This type of conduct, as we will demonstrate below, has traditionally been treated as a seizure of the person, if not as an arrest, and has been prohibited on a standard less than probable cause.

- (2) THE STATUTE HAS BEEN CONSTRUED TO AUTHORIZE A SEIZURE OF THE PERSON. SINCE THIS IS A SIGNIFICANT RESTRAINT ON LIBERTY OR BECAUSE IT IS TANTAMOUNT TO AN ARREST, IT IS PROHIBITED BY THE FOURTH AMENDMENT, EXCEPT UPON PROBABLE CAUSE.

The proponents of the statute concede that the Constitution prohibits arrests on less than probable cause, and the courts upholding the constitutionality of the statute acknowledge this. *People v. Peters, supra*; *People v. Rivera, supra*; *People v. Taggart, supra*. That they are correct needs no citation of authority.

Before the New York Court of Appeals interpreted the statute in *Peters*, this case, and *Taggart*, its advocates argued that the stop authorized by the statute was less than an arrest, and that no probable cause was therefore necessary. They further argued that effective law enforcement demanded the police be given this power, and concluded that since the invasion was so slight and the necessity so compelling, the conduct authorized was reasonable, and, since it was reasonable it was not prohibited by the Fourth Amendment.

The regulations* issued when the statute was enacted lent credence to this argument. With respect to the stop they provided:

* New York State Combined Council of Law Enforcement Officials, Memorandum on the "Stop & Frisk" Laws, reprinted in 151 N.Y.L.J., No. 108 (1964) (hereafter referred to as Combined Council Memorandum).

"If the suspect refuses to stop, the officer may use reasonable force, but only by use of his body, arms, and legs. He may not make use of a weapon or nightstick in any fashion."

With respect to the questioning, the regulations provided:

"Should the suspect refuse to answer the officer's questions, the officer cannot compel an answer and should not attempt to do so. The subject's refusal to answer shall not be considered as an element by the officer in determining whether or not there is a basis for an arrest.

"In ascertaining his name from the suspect, the officer may request to see verification of his identity, but a person shall not be compelled to produce such verification.

"If the suspect does answer, and his answers appear to be false or unsatisfactory, the officer may question further. Answers of this nature may serve as an element in determining whether a basis for arrest exists (but if an officer determines that an answer is 'unsatisfactory' and relies upon this, in part, to sustain his arrest, he should be able to explain with particularity the manner in which it is 'unsatisfactory'.)"

The statute, on its face without the cases interpreting it, coupled with the guidelines, would pose a difficult case for advocating unconstitutionality of the 'stop' provision. But after the cases construing subdivision (1), this difficulty has evaporated. The court of appeals has sanc-

tioned the use of force, including weapons, to effect a stop, and has sanctioned the compelled questioning of a suspect, rather than the mere request for information. This is more than a petty inconvenience, it is a gross invasion of the right of privacy protected by the Fourth Amendment and it poses a grave threat to the constitutional privilege against self-incrimination protected by the Fifth Amendment.*

Forcible restraint of movement coupled with compulsion to answer are significant restraints on liberty and are the kind of "seizures of the person" which the Fourth Amendment was framed to prevent. Moreover, the point at which probable cause is required has always been the point at which a significant restriction on liberty of movement was made.

It is apparent from the decisions in *Rios v. United States*, 364 U.S. 253 (1960), *Henry v. United States*, *supra*, and *Brinegar v. United States*, *supra*, that the type of seizures of the person the New York Court of Appeals has approved must be made upon probable cause.

In *Rios*, the facts were as follows: A cab had stopped at a red light. The police officer who walked up to it had no probable cause to arrest its occupants. Three different versions of what happened before the contraband was seen by the officers were given. In the original arrest report, the police stated the defendant dropped the contraband after one of the officers opened the door. At the suppression hearing, one officer testified the defendant dropped the contraband before the officer opened the door. At trial, the taxi driver testified that one of the officers drew his

* See, Horsky Report, at 45-46.

revolver and took hold of defendant's arm while he was still in the cab. The district court judge did not hear the cab driver's testimony.

This Court stated that the seizure of the contraband could only be justified if it was within one of the narrow exceptions to the warrant requirement, i.e. if it were incident to a lawful arrest. The critical question was then, when was the arrest made?

If the officers did nothing other than approach an already stationary taxi, there was no arrest. But if the taxi cab driver's story were accurate, i.e. if the officer drew his revolver and took hold of defendant's arm, then there was an arrest on less than probable cause and anything occurring after it could not be used as a predicate for probable cause. Because there was such an acute conflict in testimony, and because the cab driver's testimony was not before the district court, this Court remanded the case.

What emerges from *Rios* is that a mere non-forcible act on the part of the officer which does not restrain the person's liberty of movement is not an arrest, especially where the officer was able to inquire without arresting the defendant's liberty of movement. If during this non-forcible, non-restricting inquiry, incriminating evidence was seen, then it could be used to establish probable cause for a subsequent, forcible, restrictive curtailment of liberty. But on the other hand, if the initial act was forcible and restrictive and did therefore arrest the defendant's liberty, what was observed subsequently could not be used to justify the prior curtailment of liberty. The remand was for the purpose of resolving the facts, not the law.

The *Rios* decision explicitly recognizes the validity of the holding in *Henry v. United States, supra*, decided the previous year.

In *Henry* the agents waved a moving vehicle to a stop. At this point, no probable cause existed. After the stop was thus effected the defendants made statements which would have given the agents probable cause if they could utilize these statements. This Court held that waving a moving vehicle to a stop constituted an arrest, stating (361 U.S. at 103):

"When the officers interrupted the two men, and restricted their liberty of movement, the arrest, for the purpose of this case, was complete" (emphasis added).

In *Henry* this Court denounced restrictions of liberty based on suspicion (361 U.S. at 104):

"Under our system, suspicion is not enough for an officer to lay hands on a citizen."

The decisions in *Henry* and *Rios* are a logical outgrowth of this Court's decision in *Brinegar, supra*.

In that case, the federal agents gave chase to defendant's car and "crowded his car to the side of the road." 338 U.S. at 163. The district court found there was no probable cause before the car was stopped, but held that incriminating statements made after the stop gave the officers probable cause to search and arrest. The majority of this Court held there was probable cause before the car was forced off the road. Only Mr. Justice Burton, who concurred in a separate opinion, was willing to hold that no probable cause needed to exist before the forcible stop.

ping. Thus in *Brinegar*, the majority felt that forcing a car off the road was such a significant restriction of liberty that probable cause must exist prior to making such a restriction.*

There are lower court decisions which, on the surface, appear to sanction a stop and detention on less than probable cause. In actuality, they do not support permitting the kind of conduct the New York Court of Appeals has held the statute authorizes. Upon analysis, the stops they countenance were non-forcible and non-compelled and were not for the purpose of seizing evidence. See, *United States v. Bonanno*, 180 F. Supp. 71 (SDNY, 1960); rev'd on other grounds, 285 F. 2d 408 (2nd Cir., 1961); *United States v. Vita*, 294 F. 2d 524 (2nd Cir., 1961), cert. den. 369 U.S. 823 and *United States v. Thomas*, 250 F. Supp. 771 (SDNY, 1966). To the extent that there may be anything in these cases leading to the conclusion that a forcible, restrictive curtailment of the citizen's liberty of movement is proper absent probable cause, then those intimations are in conflict with the decisions of this Court and with the purpose of the Fourth Amendment.

We assert that grabbing a man by the shirt collar at gun point; forcing a man to leave a restaurant, or grabbing his arm and putting him against a wall is a more significant

* To the same effect: *Carroll v. U.S.*, *supra* at 177; *Long v. Ansell*, 69 F. 2d 386, 389 (D.C. Cir., 1934); *U.S. v. Scott*, 149 F. Supp. 837 (D.C. Cir., 1957); *U.S. v. Mitchell*, 179 F. Supp. 636 (D.C. Cir., 1959); *U.S. v. Viale*, 312 F. 2d 595, 601 (2nd Cir., 1963); *Coleman v. U.S.*, 295 F. 2d 555, 563-564 (D.C. Cir., 1961), cert. den. 369 U.S. 813 (1962); *Kelley v. U.S.*, 298 F. 2d 310 (D.C. Cir., 1961), where the facts are very similar to the instant appeal. See generally the Horsky Report, especially pages 25-33, for a comprehensive analysis of the cases.

"restriction of the liberty of movement" (*Henry, supra*) than is the waving of a car to a stop. We vigorously assert that the Fourth Amendment prohibits these kinds of restraint on a standard less than probable cause. To permit such restraints on less than probable cause means that the police, in their discretion, are given control over "the right of every individual to the possession and control of his own person." (*Union Pacific Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891).) This was the evil most feared by the framers of the Fourth Amendment (See Horsky Report, at 42-44); and the very essence of the Fourth Amendment is that it cannot be permitted to occur.

Since the statute has been construed to authorize a forcible seizure of the person on a standard less than probable cause, it must be declared unconstitutional.

(3) THE STANDARD EMPLOYED BY THE STATUTE RESULTS IN ARBITRARY SEIZURES OF THE PERSON.

"No right is held more sacred, or is more carefully guarded, by common law, than is the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by a clear and unquestionable authority of the law."

Union Pacific Ry. Co. v. Botsford, supra at 251.

The ability of our citizenry to move freely about the streets of its cities is an integral component of its dignity and self-respect. No man should have to fear he will be forcibly accosted by a policeman when he walks out of his home. But this statute makes that fear a very real one.

The reasonable suspicion standard employed by the statute to determine when a 'stop' can be made (as we have argued with regard to a 'search') is vague, intuitive and subjective, depending in the last analysis upon the norms of the police officer. It prevents interferences with the right of privacy only where one's conduct is perfectly normal. It also must be recognized that in dealing with the 'stop', we are dealing with a practice over which the courts often cannot apply sanctions, because often the courts are never involved with the practice at all. See Horsky Report, at 69. The combination of these two factors—vagueness of the standard and lack of case-by-case judicial control—serve to make the 'stop' even more widespread a practice than the search. The proof of this assertion is spread over the pages of Field Surveys prepared and submitted to the President's Commission on Law Enforcement and Administration of Justice. Over and over again there are examples of the kind of situations in which a policeman has reasonably suspected that an individual must be 'stopped';

"The * * * Negro juvenile * * * is picked up if he has a beard, picked up if he has the wrong clothing, picked up if he's a 'beatnik', and picked up if he's out after curfew hours without a chance to explain or give a reason; if he has a motorcycle, he is likely to be stopped. * * *"

Field Surveys IV, Vol. I, p. 89

* * * * *

"... like if a police pass you, and he be starin' at you, and you stare back, that's what gives way for them to say that, you know, you give them a dirty look. But this happen to me all the time, that maybe standin' like I'm up to something, so I stare back, they turn

on the light in back, drive their cars around, drive over there, 'c'mere. Stand up here. What you got on you?' Pattin' you all down—for what, I don't know. I've 'looked suspicious', you know, the way I've walked, swing my arms, stuff like that." Field Surveys IV, Vol. I, p. 98.

.

"When you have a bike, they just pull you over for no reason. So many little things . . . you have to have a horn, you have to have a baffle, your handlebars have to be so high and no higher." Field Surveys IV, Vol. I, p. 95.

.

"I've got a case right in my office right now that came in when it was thrown out the other day. A police officer stopped a Negro who was six foot four, and he was wearing a beard. He was driving his car down to the laundromat to do his laundry after he got off work. The officer stopped him; he asked them what for. One said, 'Well, I wanted to see how long your beard was. Let's see your drivers license. There was no traffic offense, no mechanical violation. The policeman looks at his drivers license, and says 'I'm going to call in and see if there is anything out for you.'" He calls in and there is a warrant with the same name, a traffic warrant . . . failure to appear. They go to the Marshall's office, this guy is begging them to check the license number on that other citation, check the description. He has to go to the Marshall's office where this information is kept, refuses to check it, takes him in, makes him bail out. Comes to court they find out that they were looking for a five foot six, 140

pound, blond, blue-eyed Caucasian." Field Surveys, Vol. I, p. 67.

See also Horsky Report, Appendix D, for situations in which 'reasonable suspicion' led to arrests for investigation. Out of the 26 cases utilized to present a random selection of arrest for investigation reports, only one resulted in the individual's being charged with a crime.

Because the statute permits forcible or compelled "stops" to be made upon a vague standard which does not curtail the arbitrary exercise of the practice, it must be declared *unconstitutional*.

- (4) THE 'STOP' IN THE DISCRETION OF THE POLICE OFFICER IS NOT AN EFFECTIVE WEAPON AGAINST CRIME, AND ITS COST IS GREATER THAN ITS EFFICIENCY.

The conclusion is inescapable that the 'stop' is a widespread practice, even without the addition of an official stamp of approval by legislatures and courts. However the proponents of this statute maintain that the 'stop' is absolutely necessary as a crime preventive tool and this necessity outweighs the "petty inconvenience" and "slight infringement of liberty" the practice entails.

How effective is the 'stop' as a crime preventive tool?

The proponents advance various reasons why it is not only effective but absolutely essential. First, it is said to prevent crime. But the mere presence of an officer in uniform can also achieve the same result. A forcible 'stop' achieved by use of a gun or by the laying on of hands is unnecessary. Second, it is claimed that the 'stop' enables the policeman to get information that he could not otherwise elicit. This can also be done without holding a man

by the shirt collar and pointing a gun at his chest. In fact, the literature in the field suggests that a courteous approach to the individual yields more information than does an abrupt show of authority. See Horsky Report, pages 62-63; Field Surveys IV, Vol. I, pp. 142-145; and Field Surveys V, p. 359.* A possible third justification, which has been advanced for the arrest for investigation is not even applicable here. The detention is said to keep a suspect out of circulation, and for the period of time he is detained he will not commit a crime. See Horsky Report, page 63. Since the 'stop' cannot be used as the first step in an arrest for investigation, this justification is nonexistent. A fourth justification for permitting the 'stop' is that it gives the suspect a chance to exculpate himself and avoid the stigma of an arrest and detention in jail. But where there is no probable cause to arrest for a crime and detain a man in jail on a criminal charge, we will assume that no arrest will be made and that no stigma will be forthcoming. Moreover, the possibility of exculpation exists where a man is approached and questioned courteously so that it is hard to see why force or compulsion must be employed to effect a 'stop' which is designed to permit exculpation. See also *Miranda v. Arizona*, *supra*, at 482.

In this case and in the *Peters* case, it is difficult to see what legitimate objects were achieved by the forcible 'stop' that could not have been accomplished without resort to force or compulsion.

* A National Survey of Police & Community Relations, a Report Submitted to the President's Commission on Law Enforcement & Administration of Justice (1967).

In *Peters*, the officer possibly prevented a burglary from occurring. But his mere presence in the hallway, coupled with an announcement that he was a police officer, could have done the same. It was unnecessary for him to grab the suspect's shirt collar and point his gun at his chest in order to prevent an inchoate crime. The only gain achieved was the recovery of burglar's tools, which, as in this case is merely evidence of a possessory crime. In both cases, the only gain to law enforcement produced by the forcible or compelled stop was the uncovering of evidence that could not be uncovered if this Court's decision in *Mapp v. Ohio*, was honored.*

Even assuming the forcible, compelled stop is a major weapon in the policeman's arsenal against crime, we submit that the price paid in community alienation is greater than the benefits accruing from its deployment.

While the police cannot accurately calculate the efficiency of the stop as a weapon against crime,** the studies in the area of police-community relations have shown by empirical methods, the great price paid in community alienation that its use brings about.

* See Field Surveys III, Studies in Crime & Law Enforcement in Major Metropolitan Areas (1967), Vol. 2, pages 67-68, stating that in order to define who is a suspect, the policeman obtain information not only by questioning. "Where, in the judgment of the officer, there is reason to believe he may be confronting an offender or 'suspect' or a 'suspicious' person who has committed or is committing a crime, he traditionally has utilized other means such as stopping and searching a person and his property in a public place or undertaking a search of the person's property on being called to or entering a private place." This recognizes that the search incident to a "stop" is traditionally not necessarily a means of self protection, but a means of obtaining incriminating evidence.

** Remington, *The Law Relating to "On the Street" Detention Questioning and Frisking of Suspected Persons and Police Arrest Privileges in General* in Soule, POLICE POWER AND INDIVIDUAL FREEDOM, 11, 15-18 (1962).

The San Diego survey states:

"One of the primary areas of conflict between the police and the ethnic minorities in San Diego appears to involve field interrogations. * * * The statements of both Negro citizens and Negro policemen verify the fact that the field interrogations represent a major source of conflict and irritation between the Police Department and ethnic minority groups."

Field Surveys IV, Vol. I p. 127

For a complete evaluation of the practice as seen by the police and as viewed by the community see Field Surveys IV, Vol. I, pp. 127-129; *Task Force Report: The Police* pp. 103, 147, 157, 178 and 184 and Field Surveys, Vol. V.

Where the field interrogation is coupled with a search, the price paid in community alienation is even greater. The Philadelphia survey (Field Surveys IV, Vol. 2, p. 106) quotes an attorney as stating that the worst form of police misconduct in the ghetto area is the "illegal and/or unnecessary" search and seizure. The comments of those subjected to the search are revealing:

"Another youth, in discussing field interrogations, states that he dislikes the shakedown part of it most: 'Man, I just don't dig this pulling up your shirt to see what's under there, tapping you up and down the sleeves and legs and arms.'"

Field Surveys IV, Vol. I, page 105

See also *Task Force Report: The Police*, pp. 185-187.

It is also significant to note that in *Patterns of Behaviour in Police and Citizen Transactions*, (Field Surveys III Vol. 2, page 102), the authors, in discussing the use of force or compulsion to effect a 'stop' conclude:

" * * * more persons objected to being constrained during the interrogation than to the interrogation itself."
(emphasis in the original)

The conclusion seems inescapable that the asserted gain to law enforcement from use of the 'stop' and most particularly from the use of the forcible, compelled stop coupled with a search, is heavily outweighed by the toll the practice exacts in community-police friction and hostility.

A hostile community does not cooperate with its police force, either in supplying information or tips or in making the police job easier in other ways, and thus a useful tool of law enforcement is lost.* Moreover the point often missed by the advocates of such measures as this is that "law and order are the consequence of domestic tranquility, and not the other way 'round." **

The focal point of community resentment is, unfortunately, the police. However, the one bright picture which

* "The underlying assumption for the field interrogation practice is to secure information! However, harassed people are generally not communicative or cooperative." Field Surveys, Vol. V, p. 361.

** "Blow-up in the Cities," *The New Republic*, Aug. 5, 1967, at p. 6. See also Field Surveys, Vol. V, pp. 361-362:

"Implicitly, the foregoing indicates that the successful accomplishment of American police goals are to be found elsewhere. It is suggested that this 'elsewhere' may be the community. The most effective deterrent to criminal activity may be, in the final analysis, a *community enterprise*. Community enterprise is more closely akin to a democratic system of government than is repressive police activity."

emerges from the various crime commissions field studies is that the experts in the field recognize this and are attempting to persuade the police to solve this problem*. The answer that we feel emerges is so simple yet so profound that it is difficult to state in any but biblical language: 'Violence begets violence' ** and 'a gentle answer turneth away wrath'. Furthermore, properly conceived and understood police and community relations is essentially *preventative* in its character but in an even more positive sense, its ultimate objective is in better law enforcement for the common good, and "better, in this sense, means more than simply more efficient." Field Surveys, Vol. V, p. 377.

(5) ILLEGAL SEIZURES OF THE PERSON MUST RESULT IN THE EXCLUSION OF ANY EVIDENCE RESULTING FROM THE INITIAL ILLEGALITY.

Once it is recognized that the seizure of the person on less than probable cause is illegal, then it follows that any evidence resulting directly from the initial illegality must be suppressed,† as it is essential to suppress the evidence

* "The police and segments of some communities have become convinced that they are adversaries. As a result, the staff visualizes two distinct alternative possibilities for the police: (1) They can refuse to initiate any changes and be prepared to tolerate decreasing public respect and suffer increased violence; or (2) They can admit some fallibility, welcome criticism, compromise a little, and initiate objectively considered changes in an effort to enhance public support and avoid violence. In the first instance, it is likely that the disrespect and violence will result; in the second the staff can offer only an educated prediction that conditions will improve." Field Surveys IV, Vol. I, p. 256.

** See generally Hayden, "The Occupation of Newark", *New York Review of Books*, Aug. 24, 1967.

† *Wong Sun v. United States*, *supra*; *McDonald v. United States*, *supra*; *Rios v. United States*, *supra*; *Henry v. United States*, *supra*; *Ker v. California*, *supra* and *Miller v. United States*, 357 U.S. 301 (1958).

in order, at least, to remove some of the incentive for the widespread use of illegal stops.

The law is clear that where there is an initial illegal action, whether it be an arrest, a trespass, or a failure to knock, the state cannot benefit from the officer's wrongful act. Consequently, all evidence flowing from the initial illegality either verbal or otherwise, is tainted and must be suppressed.*

Suppression of all evidence resulting from a 'stop' as defined by the New York Court of Appeals is absolutely essential if the practice is to be curtailed. The function of the exclusionary rule in the case of a 'search' is to obtain broad executive compliance with the Constitution. The taint-trespass-estoppel rule serves the same purpose in cases involving 'stops'.

Moreover no matter how prevelant the 'stop' on suspicion is at the present time, a decision of this Court condemning it as unconstitutional and applying sanctions against its use will be respected and law enforcement agencies will tailor their practices accordingly.** But even if this were not to occur, the citizen on the street must be made to feel that the courts are protecting his right to walk in dignity.

Forty years ago, Justice Brandeis summed up the essence of the Fourth Amendment:

* Without such a doctrine, there could be no such concept as a search incident to a lawful arrest. If one could use the evidence flowing from an initial illegal seizure to establish probable cause for an arrest, then the legal arrest would become an appendage of the illegal search.

** See footnote, pages 37-38, *supra*.

"The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings, and of his intellect. They know that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."

Olmstead v. United States, 277 U.S. 438, 478 (1928) (dissenting opinion).

The pressures to short-cut traditional guarantees of individual freedom are always present. But the ultimate character of a society is set as the day-to-day choice is made between efficiency and liberty. Unless this statute is held unconstitutional in its entirety, the 'most valued and comprehensive of rights' could end up just another pretty phrase on the pages of history.

POINT III

Assuming the Statute Is Not Unconstitutional on Its Face, It Is Unconstitutional by Reason of Its Application to This Case.

Even assuming, for purposes of argument, that Section 180-a of the Code of Criminal Procedure is not unconstitutional, because on its face and as construed by the New York Court of Appeals, it does not authorize an unreasonable search or an unreasonable seizure of the person, it is unconstitutional because its application to this case has resulted in permitting an unreasonable interference with the right of privacy. See *Cox v. Louisiana*, 379 U.S. 536 and 559 (1965) and *Shuttlesworth v. Birmingham*, 382 U.S. 87 (1965).

The instant case is barren of any facts indicating that appellant had committed or was about to commit a crime. During the entire eight-hour period during which the officer observed appellant (whom he had never seen before), neither narcotics nor money was passed; nor did the officer overhear any conversation. Stripped to its bare essentials, appellant, while outside the restaurant, was conversing with drug addicts, and once inside the restaurant, was sitting at a table eating pie and drinking coffee in the company of three addicts.* This statute could obviously not be designed to prevent appellant from conversing with undesirables. Appellant's behaviour was not unusual.

* The officer testified that he knew the persons with whom appellant spoke were "addicts" because over the preceding several months each one of the persons had separately volunteered to the officer the information that they were addicts. The officer could recall the names of none of these "known addicts" (R. 14-15).

In a city like New York, such meetings must be rather common, so that even if appellant were a suspected addict or seller, his mere talking to known drug addicts hardly constitutes reasonable suspicion that he had committed, was committing, or was about to commit a crime. *Beck v. Ohio, supra; United States v. DiRe*, 332 U.S. 581 (1948).

With respect to the 'stop', it is submitted that the officer's conduct exceeded that purportedly authorized by the statute on its face. First, at the time of the 'stop', the officer did not have the requisite reasonable suspicion to believe a crime was being or was about to be committed, and secondly, instead of asking for the kind of information the statute purports to authorize (appellant's name, address and an explanation of his actions), the officer compelled appellant to incriminate himself. The initial 'stop' was, therefore, unjustifiable even within the purported framework of the statute. The statute must be declared unconstitutional because, in its application, it infringes upon a constitutionally protected area by permitting an unreasonable seizure of the person and all direct products of that initial illegality must be suppressed. See *supra*, Point II, pp. 56-57.

Additionally, irrespective of whether the 'stop' was justified, under no circumstances was the officer warranted in conducting a full-blown search of appellant. Section 180-a authorizes an officer to search only when he "reasonably suspects that he is in danger of life or limb". We submit that not only is the record devoid of any proof that could sustain a finding that the officer searched because he reasonably feared danger to his person, but on the contrary, that a fair reading of the record indicates that the officer was seeking narcotics when he made the search.

The officer possessed no information that appellant was dangerous. In fact, during the entire period that appellant was under observation, the officer did not observe any weapon or any bulges.

When the officer confronted appellant inside the restaurant and asked him to accompany him outside, appellant offered no resistance. He complied to the letter with the officer's demand. On the street, the officer stated to him: "You know what I am looking for" (R. 18). Appellant then reached with his left hand into his left jacket pocket, and the officer immediately placed his hand in the same pocket and "saw in his [appellant's] hand and in his pocket he was ready to grab this cellophane—actually it was a metal tin-foil wrapper" (R. 17). At that point the officer prevented the appellant from reaching the cellophane or foil packet, which he thought appellant was attempting to throw away, and seized it himself (R. 17).

From the moment appellant was compelled to leave the restaurant until he was searched outside, his behavior was consistently one of submissiveness to and strict compliance with the officer's demands. The trial court specifically recognized this, stating:

"However, here is a police officer, known by the defendant to be a police officer. The police officer advances toward the defendant and says 'You know what I am looking for'. The defendant—may it not be so—was overcome or over-awed by a show of authority of a police officer who asks him point blank or says to him point blank, 'I am looking for contraband'. The defendant reaches into his pocket and is about to take it out, the facts are just as consistent with the inter-

pretation he is about to take it out and hand it to the police officer [rather than throw it on the street]. The police officer intercepted him" (R. 19).

The only reference to a possible fear of danger was the officer's statement that appellant 'might have been reaching for a weapon' (R. 17). This remark does not conclusively dispose of the matter. The reasonableness of the suspicion must be an objective inference from the facts, and cannot depend solely on the policeman's own testimony. *People v. Peters*, 18 N.Y. 2d at 245, 246; Combined Council Memorandum, *supra*, and 78 Harv. L. Rev. 474 [1964]). Moreover the very statement itself is suspect since the officer had previously stated he put his hand in appellant's pocket to keep appellant from attempting to throw the contraband away (R. 16-17) and in the complaint swore that appellant took the narcotics out as the officer approached (R. 1).

Neither can an inference of danger be drawn from the fact that appellant mumbled something before complying with the officer's demand. In this context the mumbling is more indicative of resignation than some sinister purpose.

As one commentator points out,* had the officer felt that appellant might be dangerous, he never would have permitted appellant the luxury of reaching into his pocket:

" * * * Indeed, if the officer thought that he was in any danger, would he not have made the frisk himself, as was done in *Rivera*? Surely, he would not have ordered the "dangerous" suspect to hand over some-

* Schwartz, *supra* footnote, p. 80.

thing which was not in the suspect's hand at the time, therefore *requiring* him to go into his pockets and obtain access to whatever weapons might be there. A bona fide frisk for safety involves keeping the suspect's hands *out* of his pockets, not *in* them. Indeed, the officer himself described his understanding of Sibron's actions as "reaching in his pocket to throw it out."

It is submitted that in the total context of this record it was unreasonable and even unrealistic for the officer to suspect that appellant was reaching for a weapon.

Judge Keating, speaking for the majority in *People v. Peters*, 18 N.Y. 2d at 245 stated:

"For in the last analysis the constitutionality of the statute is determined not so much by the language employed as by the conduct it authorizes."

In this case the conduct which the New York Court of Appeals held the statute to authorize is *carte blanche* for the arbitrary and high-handed stopping, questioning and searching of everyman. Were this Court to sustain the constitutionality of Section 180-a after its application in this case, Judge Fuld's prophecy in his dissenting opinion in *Rivera*, 14 N.Y. 2d at 448, will be proved correct:

" . . . a method will have been devised by which the Fourth Amendment's prohibition against unreasonable searches may be evaded and the exclusionary rule of *Mapp v. Ohio* (367 U.S. 643), to a large extent, written off the books."

Conclusion

For all of the foregoing reasons, Section 180-a of the New York Code of Criminal Procedure must be declared unconstitutional, and the judgment of conviction herein reversed, and the evidence suppressed.

Aug. 23, 1967.

Respectfully submitted,

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1967

No. 63

NELSON SIBRON,

—v.—

STATE OF NEW YORK,

No. 74

JOHN FRANCIS PETERS,

—v.—

STATE OF NEW YORK,

No. 67

JOHN W. TERRY

—v.—

STATE OF OHIO,

Office-Supreme Court, U.S.

FILED

AUG 31 1967

JOHN F. DAVIS, CLERK

Appellant,

Appellee.

Appellant,

Appellee.

Petitioner,

Respondent.

**BRIEF FOR THE N.A.A.C.P. LEGAL DEFENSE AND
EDUCATIONAL FUND, INC., AS AMICUS CURIAE**

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1967

No. 63

NELSON SIBRON,

—v.—

STATE OF NEW YORK,

Appellant,

Appellee.

No. 74

JOHN FRANCIS PETERS,

—v.—

STATE OF NEW YORK,

Appellant,

Appellee.

No. 67

JOHN W. TERRY,

—v.—

STATE OF OHIO,

Petitioner,

Respondent.

**BRIEF FOR THE N.A.A.C.P. LEGAL DEFENSE AND
EDUCATIONAL FUND, INC., AS AMICUS CURIAE**

Interest of the Amicus Curiae

"I am married to Raymond Fullwood, a Negro. Because I am Caucasian, in the five years of our marriage, we have been stopped no less than twenty times by Los Angeles police officers. . . . I am certain that the reason they chose to stop us is because we are a mixed

couple." Mrs. Marilyn Fullwood, in Los Angeles, California.¹

"Association of a woman with men of another race usually results in the immediate conclusion that she is a prostitute. If a Negro woman is found in the company of a white man, she is usually confronted by the police and taken to the station unless it is clear that the association is legitimate." Detroit, Michigan police practice, as observed by Professor Wayne R. LaFave.²

The N.A.A.C.P. Legal Defense and Educational Fund, Inc., is a non-profit membership corporation, incorporated under the laws of the State of New York in 1939. It was formed to assist Negroes to secure their constitutional rights by the prosecution of lawsuits. Its charter declares that its purposes include rendering legal aid gratuitously to Negroes suffering injustice by reason of race or color who are unable, on account of poverty, to employ and engage legal aid on their own behalf. The charter was ap-

¹ Quoted in AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA, REPORT, POLICE MALPRACTICE AND THE WATTS RIOT 15-16 (1965), reproduced in CRAY, THE BIG BLUE LINE 31 (1967). Cray documents for other cities as well as the prevalence of the police practice of accosting interracial couples. *Id.* at 227 n. 3. See also *Rexroth, The Fuzz*, 14 PLAYBOY (No. 7) 76 (July 1967).

² LAFAVE, ARREST—THE DECISION TO TAKE A SUSPECT INTO CUSTODY 455 (1965). See PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE 184 (1967): "[F]ield interrogations are sometimes used in a way which discriminates against minority groups, the poor, and the juvenile. For example, the Michigan State Survey found, on the basis of riding with patrol units in two cities, that members of minority groups were often stopped, particularly if found in groups, in the company of white people, or at night in white neighborhoods, and that this caused serious problems." Cf. *Dokes v. Arkansas*, O. T. 1967, No. 109.

proved by a New York court, authorizing the organization to serve as a legal aid society. The N.A.A.C.P. Legal Defense and Educational Fund, Inc., is independent of other organizations and supported by contributions of funds from the public.

A central purpose of the Fund is the legal eradication of practices in our society that bear with discriminatory harshness upon Negroes and upon the poor, deprived, and friendless, who too often are Negroes. The stop and frisk procedure which New York and Ohio ask this Court to legitimate in these cases is such a practice. The evidence is weighty and uncontradicted that stop and frisk power is employed by the police most frequently against the inhabitants of our inner cities, racial minorities and the underprivileged.³ This is no historical accident or passing circumstance. The essence of stop and frisk doctrine is the sanctioning of judicially uncontrolled and uncontrollable discretion by law enforcement officers.⁴ History, and not in this century alone, has taught that such discretion comes inevitably to be used as an instrument of oppression

³ PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE 183-185 (1967); 2 STUDIES IN CRIME AND LAW ENFORCEMENT IN MAJOR METROPOLITAN AREAS (Field Surveys III) 82-108 (Report of a Research Study Submitted to the President's Commission on Law Enforcement and Administration of Justice, 1967) [hereafter cited as University of Michigan Study]; SKOLNICK, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY 217-219 (1966); TIFFANY, MCINTYRE & ROTENBERG, DETECTION OF CRIME: STOPPING AND QUESTIONING, SEARCH & SEIZURE, ENCOURAGEMENT & ENTRAPMENT 20-21 (1967); Schwartz (Herman), "Stop and Frisk" in New York Law and in Practice: A Case Study in the Abdication of Judicial Control Over the Police (unpublished manuscript) 31-34, and authorities cited.

⁴ See part III, *infra*.

of the unpopular.⁵ It was so in the case of the search and seizure practices which the Fourth Amendment was written to condemn.⁶ We believe that that Amendment protects the unpopular, the Negro, and all our citizens alike, from subjection to the oppressive police discretion which stop and frisk embodies.

In the litigation now before the Court—as is usual in cases where police practices are challenged—two parties essentially are represented. Law enforcement officials, legal representatives of their respective States, ask the Court to broaden police powers, and thereby to sustain what has proved to be a “good pinch.” Criminal defendants caught with the goods through what in retrospect appears to be at least shrewd and successful (albeit constitutionally questionable) police work ask the Court to declare that work illegal and to reverse their convictions. Other parties intimately affected by the issues before the Court are not represented. The many thousands of our citizens who have been or may be stopped and frisked

⁵ “Where lawless police forces exist, their activities may impair the civil rights of any citizen. In one place the brunt of illegal police activity may fall on suspected vagrants, in another on union organizers, and in another on unpopular racial and religious minorities, such as Negroes, Mexicans, or Jehovah’s Witnesses. But wherever unfettered police lawlessness exists, civil rights may be vulnerable to the prejudices of the region or of dominant local groups, and to the caprice of individual policemen. Unpopular, weak, or defenseless groups are most apt to suffer.” PRESIDENT’S COMMITTEE ON CIVIL RIGHTS, REPORT: TO SECURE THESE RIGHTS 25 (1947). See also TREBACH, THE RATIONING OF JUSTICE 5-6 (1964); CRAY, THE BIG BLUE LINE 113-127, 183-194 (1967); AMERICAN CIVIL LIBERTIES UNION, POLICE POWER AND CITIZENS’ RIGHTS 6-13 (1967); *Lankford v. Gelston*, 364 F. 2d 197, 203-204 (4th Cir. 1966) (*en banc*).

⁶ See the history recounted in *Marcus v. Search Warrant*, 367 U. S. 717 (1961), and *Stanford v. Texas*, 379 U. S. 476 (1965).

yearly, only to be released when the police find them innocent of any crime, are not represented.⁷ The records of their cases are not before the Court and cannot be brought

⁷ The prevalence of the practice of street detention and interrogation, and of the related practice of arrest for investigation, is universally acknowledged. Concerning the former, see PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *op. cit. supra*, note 3, at 183-185; SKOLNICK, *op. cit. supra*, note 3, at 224-225; LAFAYE, *op. cit. supra*, note 3, at 344-345; TIFFANY, MCINTYRE & ROTENBERG, *op. cit. supra*, note 3, at 5-86; Note, *Detention, Arrest, and Salt Lake City Police Practices*, 9 UTAH L. REV. 593, 610-616, 618 (1965); Note, *Philadelphia Police Practices and the Law of Arrest*, 100 U. PA. L. REV. 1182, 1189, 1193, 1195, 1200-1206 (1952). Concerning the latter, see DISTRICT OF COLUMBIA, REPORT AND RECOMMENDATIONS OF THE COMMISSIONERS' COMMITTEE ON POLICE ARRESTS FOR INVESTIGATION (1962) (*The Horsky Report*); LAFAYE, *op. cit. supra*, note 3, at 300-364; TREBACH, *op. cit. supra*, note 5, at 4-7; Foote, *Law and Police Practice: Safeguards in the Law of Arrest*, 52 NW. U. L. REV. 16 (1957); LaFave, *Detention for Investigation by the Police: An Analysis of Current Practices* [1962], WASH. U. L. Q. 331.

What proportion of persons subjected to these practices and frisked or searched is found to be innocent of any crime cannot now be reliably determined. The National Crime Commission's Task Force on Police describes a study finding that two out of ten persons "frisked" were found to be carrying either a gun or a knife. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *op. cit. supra*, note 3, at 185. We have not been able to determine whether the study referred to is the same study (involving 224 cases) that is summarized in 2 University of Michigan Study 87, but it appears to be. The summary coincides with the Task Force Report in showing that guns or knives were discovered in twenty-one per cent of personal searches by police. Like the Task Force Report, it does not purport to say what proportion of these weapons was illegally possessed. It does disclose that stolen property and other criminal evidence was very infrequently found, with the result that seventy-nine out of one hundred persons searched by police in confrontations originating "on view" were discovered to have nothing incriminating; and seventy-four out of one hundred persons searched in confrontations originating with a police dispatch also were discovered to have nothing incriminating. Most significant, the University of Michigan study makes clear what the Task Force Report leaves ambiguous: that the personal searches studied include (and may well be com-

here. Yet it is they, far more than those charged with crime, who will bear the consequences of the rules of constitutional law which this Court establishes. The determination of the quantum of "belief" or "suspicion" required to justify the exercise of intrusive police authority is precisely the determination of how far afield from instances of obvious guilt the authority stretches. To lower that quantum is to broaden the police net and, concomitantly, to increase the number (and probably the proportion)⁸ of innocent people caught

prised primarily of) searches incident to a valid arrest on probable cause. *Id.* at 89. This last circumstance doubtless explains the extraordinarily high yield (a little over 20 per cent) reported here, compared with the low yield elsewhere observed for police investigative practices undertaken without probable cause—for example, the arrests for investigation studied in the Horsky Report, DISTRICT OF COLUMBIA, REPORT AND RECOMMENDATIONS OF THE COMMISSIONERS' COMMITTEE ON POLICE ARRESTS FOR INVESTIGATION 34 (1962); Kamisar, *Book Review*, 76 HARV. L. REV. 1502, 1506 (1963) (seventeen out of eighteen persons arrested for investigation are released without being charged), and the automobile stops and related practices mentioned in Foote, *The Fourth Amendment: Obstacle or Necessity in the Law of Arrest*, 51 J. CRIM. L., CRIM. & POL. SCI. 402, 406 (1960). The data, of course, are fragmentary. *Cf.* the testimony of a retired Detroit policeman before the United States Civil Rights Commission, quoted in CRAY, *op. cit. supra*, note 5, at 185:

"I would estimate—and this I have heard in the station also—that if you stop and search 50 Negroes and you get one good arrest out of it that's a good percentage; it's a good day's work. So, in my opinion, there are 49 Negroes whose rights have been misused, and that goes on every day. That's just about the entire population of Detroit over a period of time."

⁸ Again, it is difficult to test this supposition empirically. See note 7 *supra*; and see Foote, *Law and Police Practice: Safeguards in the Law of Arrest*, 52 NW. U. L. REV. 16 (1957). However, if the sort of police judgment assumed alike by the differing concepts of probable cause and reasonable suspicion is at all rational, one would suppose that the less compelling the perceived evidence of guilt, on which an officer acts, the higher proportion of persons he will affect who turn out to be innocent.

up in it. The innocent are those this Court will never see.⁹ Yet we believe that some attention to their situation and appreciation of their interests is indispensable to the appropriate resolution of the constitutional controversy now presented. With deference, *amicus curiae* wishes to speak principally in behalf of their interests—which we conceive to be indistinguishable (but for the vagaries of a “reasonable suspicion”) from those of the citizenry generally.

These interests, of course, are not adverse to those of the police, except insofar as the police interests may be quite parochially defined. The citizen on the street needs the protection of the police, amply empowered; just as he needs protection from them. He is the potential victim both of crime and of law enforcement. His interest does not lie in “handcuffing the police.” But neither does it lie in giving the police every power over his life which they claim is indispensable to efficient crime control.¹⁰ Against

⁹ “The statistical data [about abusive police practices] are difficult to find and document, for most people who are mistreated by the police tend to be poor, friendless, out-of-the-ordinary members of society and frequently in trouble with the law in other situations. They don’t complain often, and when they do, seldom have the money, time, confidence in the ‘system’ or knowledge of the agencies that could help them to thread their way through the maze of legal steps necessary to challenge the abuse.

“Moreover, fear of reprisal by the police is quite real, especially among Negroes and other minorities, but this trepidation has no social or economic bounds. There is a general wish to ‘stay out of trouble’ among many white, middle-class citizens.” AMERICAN CIVIL LIBERTIES UNION, *POLICE POWER AND CITIZENS’ RIGHTS* 6 (1967). See also SKOLNICK, *op. cit. supra*, note 3, at 221-222, 233-234.

¹⁰ Cf. *Johnson v. United States*, 333 U. S. 10, 14 (1948): “Crime, even in the privacy of one’s own quarters, is, of course, of grave concern to society, and the law allows such crime to be reached on proper showing. The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom

that latter course the Fourth Amendment and every aspiration of a free society oppose.¹¹

The parties have consented to the filing of an *amicus curiae* brief by the N.A.A.C.P. Legal Defense and Educational Fund, Inc. Copies of their letters of consent will be submitted to the Clerk with this brief.

from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent."

¹¹ It is not so with some societies. Consider the extraordinarily efficient South African police practice reported in the *New York Times*, January 23, 1966:

"JOHANNESBURG, Jan. 22—The police in Johannesburg have hit on an effective, if crude, way to reverse an alarming rise in armed robberies in the city: to treat every black man as a criminal suspect.

"This is done by saturating a proscribed area with policemen under orders to check the 'reference books'—the passports all blacks must carry in 'white' areas—of every African they encounter. Sometimes the orders also call for thorough searches of any parcels the blacks may be carrying, or even of their persons.

"These police blitzes employ anywhere from 1,000 to 2,500 officers each. They come without warning, usually to the city's business district. . . .

"The arrests are almost always for irregularities in the reference books, not for armed robbery. But the effect is evidently to keep criminals off the streets and off balance. Since early November the raids have been held almost weekly, with the result that the number of armed robberies has been reduced by more than 50 per cent.

"The undeniable success of the raids shows that it is not a fantastic notion for the white authorities to find a suspicion of criminality in a black skin—an indication of the extent to which this is a society at war with itself."

ARGUMENT

I.

The Issues.

These stop and frisk cases present a congeries of issues. May a police officer constitutionally restrain an individual for the sole purpose of investigating him? If so, under what circumstances? Upon probable cause to believe him guilty of a crime? Upon "reasonable suspicion"?¹² What is the permissible extent of the restraint? How long may it last?¹³ How much force may be used to effect it? May the police officer constitutionally search the citizen incident to such restraint, or incident to questioning without restraint? If so, under what circumstances? Whenever a citizen is restrained or questioned? When there is probable cause to believe (or when there is "reasonable suspicion") that the citizen is armed? How intrusive may the search be? May some or all objects discovered in the search be admitted

¹² The present cases do not present factually the question of the extent of police powers to "freeze" the scene of a recent and palpable crime, as where patrol officers responding to a call find a man bleeding on the ground and others fleeing. Nor are those cases necessarily controlled by what the Court may hold here.

¹³ The present cases do not present factually instances of extended on-the-street detention. Nor do they present instances of removal of the citizen to a squad car or to the police station. However, insofar as the New York statute here attacked on its face may allow extended detention and a shift in the locus of custody, this Court may properly consider the constitutionality of a stop-and-frisk authorization which is not limited in the time or place of the detention it allows. Cf. *Berger v. New York*, — U. S. (—), 87 S. Ct. 1873 (1967).

into evidence against the citizen in a criminal trial? Weapons? Burglars' tools? Narcotics?"

This Court may wish to treat these issues more or less discretely. But their proliferation should not conceal the point that what is fundamentally in question here is the choice, under the Constitution, between two antagonistic models of the police investigative process. This is true conceptually, as study of the burgeoning literature of stop and frisk reveals.¹⁵ It is true historically, because the Court

¹⁴ The present cases do not present factually the question whether objects seized in a frisk, other than those which it is illegal to possess, may be used in evidence in a criminal trial of the frisked citizen. However, because of the intimate relationship between the substantive constitutional rules regulating police conduct and the exclusionary sanction by which they are enforced, see part II, *infra*, the Court may wish to consider that question.

¹⁵ Detailed and useful analyses of stop and frisk doctrine and related issues are found in AMERICAN LAW INSTITUTE, MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE, Tent. Draft No. 1, March 1, 1966, Commentary on §2.02, at pp. 91-105; DISTRICT OF COLUMBIA, REPORT AND RECOMMENDATIONS OF THE COMMISSIONERS' COMMITTEE ON POLICE ARRESTS FOR INVESTIGATION (1962) (*The Horsky Report*); LAFAYETTE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY 300-364 (1965); TIFFANY, MCINTYRE & ROTENBERG, DETECTION OF CRIME: STOPPING & QUESTIONING, SEARCH & SEIZURE, ENCOURAGEMENT AND ENTRAPMENT 5-94 (1967); Barrett, *Personal Rights, Property Rights, and the Fourth Amendment* [1960], SUPREME COURT REV. 46, 57-70; Bator & Vorenberg, *Arrest, Detention, Interrogation and the Right to Counsel: Basic Problems and Possible Legislative Solutions*, 66 COLUM. L. REV. 62 (1966); Foote, *Law and Police Practice: Safeguards in the Law of Arrest*, 52 NW. U. L. REV. 16 (1957); Foote, *The Fourth Amendment: Obstacle or Necessity in the Law of Arrest*, 51 J. CRIM. L., CRIM. & POL. SCI. 402 (1960); DeFave, *Detention for Investigation by the Police: An Analysis of Current Practices* (1962), WASH. U. L. Q. 331; Leagle, *The Fourth Amendment and the Law of Arrest*, 54 J. CRIM. L., CRIM. & POL. SCI. 393 (1963); Remington, *The Law Relating to "On the Street" Detention, Questioning and Frisking of Suspected Persons and Police Privileges in General*, 51 J. CRIM. L., CRIM. & POL. SCI. 386 (1960); Souris, *Stop and Frisk or Arrest and Search—The Use and Misuse of Euphemisms*, 57 J. CRIM. L.,

is now asked for the first time to legitimate criminal investigative activity that significantly intrudes upon the privacy

CRIM. & POL. SCI. 251 (1966); Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315 (1942); Wilson, *Police Arrest Privileges in a Free Society: A Plea for Modernization*, 51 J. CRIM. L., CRIM. & POL. SCI. 395 (1960); Note, *Stop and Frisk in California*, 18 HASTINGS L. J. 623 (1967); Comment, *Selective Detention and the Exclusionary Rule*, 34 U. CHI. L. REV. 158 (1966); Comment, *Police Power to Stop, Frisk, and Question Suspicious Persons*, 65 COLUM. L. REV. 847 (1965); Note, *Detention, Arrest, and Salt Lake City Police Practices*, 9 UTAH L. REV. 593 (1965); Symposium Note, *The Law of Arrest: Constitutionality of Detention and Frisk Acts*, 59 NW. U. L. REV. 641 (1964); Note, *Philadelphia Police Practices and the Law of Arrest*, 100 U. PA. L. REV. 1182 (1952); Note, 4 HOUSTON L. REV. 589 (1966); Case Note, 35 FORDHAM L. REV. 355 (1966); Recent Statute, 78 HARV. L. REV. 473 (1964).

See also STATE OF NEW YORK, TEMPORARY STATE COMMISSION ON THE CONSTITUTIONAL CONVENTION, INDIVIDUAL LIBERTIES, THE ADMINISTRATION OF CRIMINAL JUSTICE 67-70 (1967); Aspen, *Arrest and Arrest Alternatives: Recent Trends* (1966), U. ILL. L. FORUM 241, 250-253; Goldstein, *Police Policy Formulation: A Proposal for Improving Police Performance*, 65 MICH. L. REV. 1123, 1139-1140 (1967); Kamisar, *A Dissent from the Miranda Dissents: Some Comments on the "New" Fifth Amendment and the "Old" Voluntariness Test*, 65 MICH. L. REV. 59, 60-61 n. 8 (1966); Kamisar, *Book Review*, 76 HARV. L. REV. 1502 (1963); Kuh, *Reflections on New York's "Stop-and-Frisk" Law and Its Claimed Unconstitutionality*, 56 J. CRIM. L., CRIM. & POL. SCI. 32 (1965); LaFave, *Search and Seizure: "The Course of True Law . . . Has Not . . . Run Smooth"* [1966], U. ILL. L. FORUM 255, 308-311; Ronayne, *The Right to Investigate and New York's "Stop and Frisk" Law*, 33 FORDHAM L. REV. 211 (1964); Schoenfeld, *The "Stop and Frisk" Law is Unconstitutional*, 17 SYRACUSE L. REV. 627 (1966); Siegel, *The New York "Stop and Frisk" and "Knock-Not" Statutes: Are They Constitutional?*, 30 BROOKLYN L. REV. 274 (1964); Traynor, *Mapp v. Ohio at Large in the Fifty States* [1962], DUKE L. J. 319, 333-334; Vorenberg, *Police Detention and Interrogation of Uncounselled Suspects: The Supreme Court and the States*, 44 B. U. L. REV. 423 (1964); Note, *"Stop and Frisk" and its Application in the Law of Pennsylvania*, 28 U. PITT. L. REV. 488 (1967); Recent Decision, 18 W. RES. L. REV. 1031 (1967); Recent Case, 71 DICK. L. REV. 682 (1967); Recent Decision, 5 DUQUESNE L. REV. 444 (1967); Note, 13 WAYNE L. REV. 449 (1967); Legislation, 38 ST. JOHN'S L. REV. 392, 398-405 (1964).

of individuals who are undifferentiable from Everyman as the probable perpetrators of a crime.¹⁶ It is true in the practical, day-to-day world of the streets and the lower courts, as we propose to develop more fully in the discussion that follows. Initially it will be helpful, we believe, to identify the two contending models and their attributes.

The Classical Arrest-Search Model

Under classical criminal procedure, the police may accost and question any person for the purpose of criminal investigation.¹⁷ But they may not detain him, restrain or "arrest" his liberty of movement in any significant way, except

¹⁶ See notes 35-36 *infra* and accompanying text.

¹⁷ Most of the older cases cited by the proponents of modern-day stop and frisk do no more than recognize that the police are free to question an individual on the street so long as they do not detain him in any way. Cases which denominate such questioning an "arrest," forbidden in the absence of probable cause, are generally found to involve circumstances in which the police communicated to the individual an effective sense of restraint. The decisions are discussed exhaustively in the literature cited in note 15 *supra*; note 18 *infra*. They are adequately summarized in the following passage from Recent Decision, 37 MICH. L. REV. 311, 313 (1938):

"[A]lthough the courts rarely discuss the question, whether stopping and questioning is an arrest seems to be decided on the basis of whether any restraint of personal liberty is involved. Thus, where force or threat of force is used and the subject submits to the authority of the officer for questioning, an arrest occurs. On the other hand, where the officer merely approaches or accosts the suspect and asks him questions, there is no arrest because there is no restraint of the person. Still other courts hold that merely stopping a traveler on the highway is an arrest."

So far as we are aware, no one seriously contends that the police are or should be prohibited from non-coercive questioning of an individual on the street, provided that it remains clear to him that he is free to leave and to refuse to answer questions. We, certainly, would not so contend.

for the purpose of holding him to answer criminal charges.¹⁸ Any such restraint of an individual is an arrest, and may be made only on probable cause to believe him guilty of an offense.¹⁹ The police may not make a personal search of an individual, without a warrant or effective consent, except

¹⁸ "The police have no power to detain anyone unless they charge him with a specified crime and arrest him accordingly. Arrest and imprisonment are in law the same thing. Any form of physical restraint is an arrest, and imprisonment is only a continuing arrest. If an arrest is unjustified, it is wrongful in law and is known as false imprisonment. The police have no power whatever to detain anyone on suspicion or for the purpose of questioning him. They cannot even compel anyone whom they do not arrest to come to the police station." DEVLIN, *THE CRIMINAL PROSECUTION IN ENGLAND* 82-83 (1958). Accord: Williams, *Police Detention and Arrest Privileges under Foreign Law: England*, 51 J. CRIM. L., CRIM. & POL. SCI. 413, 413-414 (1960). This is assumed by the principal American writers on arrest, see Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315, 318 (1942); Waite, *The Law of Arrest*, 24 TEXAS L. REV. 275, 279 (1946); Perkins, *The Law of Arrest*, 25 IOWA L. REV. 201, 261 (1940); Wilgus, *Arrest Without a Warrant*, 22 MICH. L. REV. 541, 798 (1924). It is also assumed in this Court's decisions under the Fourth Amendment, see note 54 *infra*. Concerning the "charging purpose" component of classical arrest theory, see note 55 *infra*.

Nothing said here touches the question what powers police may have to take custody of an individual for non-criminal purposes—as when a sick or drunk adult or a lost child is found on the street. The question is not now before the Court.

¹⁹ E.g., *United States v. Di Re*, 332 U. S. 581 (1948); *Johnson v. United States*, 333 U. S. 10 (1948); *Wong Sun v. United States*, 371 U. S. 471 (1963); *Beck v. Ohio*, 379 U. S. 89 (1964). See Foote, *The Fourth Amendment: Obstacle or Necessity in the Law of Arrest*, 51 J. CRIM. L., CRIM. & POL. SCI. 402:

"In the law of arrest and by long constitutional history, 'reasonable' has been interpreted as the equivalent of probable cause. An officer acts reasonably if, on the facts before him, it would appear that the suspect has probably committed a specific crime. This is the context in which the word is used in the fourth amendment and in most state arrest laws. Our cases sharply distinguish the reasonableness of an arrest on probable cause from an unreasonable apprehension grounded on 'mere' suspicion."

that, incidental to a valid arrest, they may make a more or less intensive personal search.²⁰ The *Classical Arrest-Search Model* thus recognizes two categories of police investigative powers. Powers whose exercise does not significantly invade personal liberty and the right of privacy—the “right to be let alone”²¹—are given the police to use at large, indiscriminately, at their discretion, and without judicial supervision. Powers whose exercise does invade these rights may be used by the police, but not indiscriminately, not against Everyman. They may be used only against persons whom there is probable cause, to believe are criminal actors, and hence distinguishable from Everyman. The “probable cause” determination made by a policeman

²⁰ See note 54 *infra* concerning search incident to arrest. It is plain that a personal search without a warrant, not incident to arrest, is forbidden by the Fourth Amendment. *United States v. Di Re*, 332 U. S. 581 (1948); *Beck v. Ohio*, 379 U. S. 89 (1964); and see *Schmerber v. California*, 384 U. S. 757 (1966).

²¹ See Mr. Justice Brandeis, dissenting, in *Olmstead v. United States*, 277 U. S. 438, 471, 478-479 (1928):

“The protection guaranteed by the Amendments is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man’s spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are found in material things. They sought to protect Americans in their beliefs, their thought, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. And the use, as evidence in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the Fifth.”

Justice Brandeis’ view, of course, has subsequently been vindicated by the Court. *Berger v. New York*, — U. S. —, 87 S. Ct. 1873 (1967); *Griswold v. Connecticut*, 381 U. S. 479 (1965).

as the precondition of the exercise of these powers is judicially reviewable.²² "The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating these often opposing interests [of law enforcement and personal liberty]. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice."²³

The Stop-Frisk Model

In theory, the *Stop-Frisk Model* differs from the *Classical Arrest-Search Model* in that it recognizes at least three, perhaps more, categories of police powers.²⁴ First, police may accost and question any person, so long as they do not restrain or search him. Second, they may arrest him on probable cause and search his person incident to that valid arrest. The third category of powers is lodged between these two. A law enforcement officer lacking probable cause but having some state of mind (or encountering some circumstances) which makes his focus upon a given individual something other than random, something more particular-

²² "The requirement of probable cause has roots that are deep in our history. The general warrant, in which the name of the person to be arrested was left blank, and the writs of assistance, against which James Otis inveighed, both perpetuated the oppressive practice of allowing the police to arrest and search on suspicion. Police control took the place of judicial control, since no showing of 'probable cause' before a magistrate was required." *Henry v. United States*, 361 U. S. 98, 100 (1959).

²³ *Brinegar v. United States*, 338 U. S. 160, 176 (1949) (a case of warrantless search), quoted in *Beck v. Ohio*, 379 U. S. 89, 91 (1964) (a case of warrantless arrest).

²⁴ The conceptual basis for the Model may involve the repudiation of any attempt to categorize, leaving every individuated instance of police activity to be determined lawful or unlawful, constitutional or unconstitutional, through a "balancing" of its intrusiveness against its justification. See note 57 *infra*.

ized than whim, may "stop" or detain the individual without an "arrest." The nature of the prerequisite state of mind (or set of circumstances) varies. The Uniform Arrest Act uses the phrase "reasonable ground to suspect."²⁵ New York Code of Criminal Procedure, § 180-a, employs "reasonably suspects." The A. L. I. Model Code of Pre-Arrestment Procedure uses other formulations.²⁶ The common theme is something less than probable cause, but something which purports to provide a judicial curb against wholly indiscriminate police action.

The nature of the "stop" that is not an arrest also varies. The Uniform Arrest Act permits an officer, unsatisfied by initial answers to questioning, to detain his suspect for two hours. The A. L. I. Model Code limits the period to twenty minutes, and expressly disallows the use of deadly force in effecting a "stop." The New York statute is silent both on the period of permitted detention and on the amount of force which the officer may employ to enforce it. Specific "stop" authorizations also differ as to whether the "stopping" officer is allowed to remove his detainee from the

²⁵ Uniform Arrest Act, § 2. The Act is set out in Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315, 343, 344 (1942). Versions of the Act (using the terms "reasonably suspects" or "reason to suspect") are in effect in Delaware, New Hampshire and Rhode Island. Del. Code Ann., tit. 11, §§ 1902-1903 (1953); N. H. Rev. Laws, §§ 594:2-594:3 (1955); and Rhode Island, R. I. Gen. Laws, §§ 12-7-1-12-7-12 (1956). The Act appears to have been gutted by judicial construction at least in Delaware and Rhode Island; see *De Salvatore v. State*, 2 Storey (Del.) 550, 163 A. 2d 244 (1960); *Kavanaugh v. Stenhouse*, 93 R. I. 252, 174 A. 2d 560 (1961), *appeal dismissed for want of a substantial federal question*; 368 U. S. 516 (1962). These decisions appear to equate reasonable suspicion with the constitutional standard of probable cause.

²⁶ AMERICAN LAW INSTITUTE, MODEL CODE OF PRE-ARRESTMENT PROCEDURE, § 2.02, Tentative Draft No. 1, March 1, 1966, at p. 6.

scene of their first encounter.²⁷ They differ with regard to the places in which and the circumstances under which the "stop" power is given. The Uniform Arrest Act allows stops of persons "abroad." The A. L. I. Code has no such restriction, but delimits the stop power by providing that it shall not be used "solely to aid in investigation or prevention of" designated offenses. The New York statute uses the term "abroad in a public place" (which the Court of Appeals in *Peters* construed to include the common hallways of apartment buildings, inconsistently with the construction previously put on the phrase in a circular published for police guidance by the New York State Combined Council of Law Enforcement Officials),²⁸ and also delimits the "reasonable suspicion" to suspicion of felonies and designated misdemeanors.

Under the *Stop-Frisk Model*, persons authorized to be detained may also be "frisked" or searched. (Undoubtedly, a legislature might give the power to "stop" without accompanying power to "frisk," but all of the significant pieces of legislation so far proposed or enacted couple "stop" with "frisk," and the proponents of stop and frisk seem unanimous that "frisk" is necessary if "stop" is to be effective.²⁹ Frisk may be allowed whenever stop is al-

²⁷ The Uniform Arrest Act, § 2(2), (3) implicitly permits removal to a station house. The A. L. I. Model Code, § 2.02(1), (2), (3) more or less explicitly disallows it. The New York Courts, construing the New York statute, appear to permit it. *People v. Pugach*, 15 N. Y. 2d 65, 204 N. E. 2d 176 (1964); *People v. Hoffman*, 24 App. Div. 2d 497, 261 N. Y. S. 2d 651 (1965).

²⁸ See pp. 54-55, *infra*.

²⁹ E.g., AMERICAN LAW INSTITUTE, MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE, Commentary to § 2.02, Tent. Draft No. 1, March 1, 1966, at p. 102; Remington, *supra*, note 15, at 391; Symposium Note, *supra*, note 15, 59 Nw. U. L. REV. at 652-653.

lowed; or it may be allowed only upon the fulfilment of additional conditions, such as the existence of reasonable grounds to suspect that the officer is in danger.³⁰ It may be allowed more or less extensively³¹ and more or less intrusively.³² Its object may be limited or unlimited,³³ and the nature of the items discovered in the search which may be

³⁰ The Uniform Arrest Act, § 3, allows search whenever the officer "has reasonable ground to believe that he is in danger if the person possesses a dangerous weapon." (Emphasis added.) The A. L. I. Model Code allows search if the officer "reasonably believes that his safety so requires." The New York statute purports to limit the search power to situations in which the officer "reasonably suspects that he is in danger of life or limb," but the Court of Appeals in the *Peters* case appears to have read that restriction out of the statute, by force of a presumption of law that an officer making a stop is always *ipso facto* in danger of life or limb.

³¹ The Uniform Arrest Act, § 3, and the New York statute authorize search of the "person" stopped. The New York courts have extended the search power to packages carried by that person, even though these might be put out of his reach during the period of the stop. *People v. Pugach*, 15 N. Y. 2d 65, 204 N. Y. 2d 176 (1964); *People v. Reason*, — Misc. 2d —, 276 N. Y. S. 2d 196 (Sup. Ct. 1966); see *People v. Cassesse*, 47 Misc. 2d 1031, 263 N. Y. S. 2d 734 (Sup. Ct. 1965). The A. L. I. Model Code explicitly allows the search of the stopped "person and his immediate surroundings, but only to the extent necessary to discover any dangerous weapons which may on that occasion be used against the officer."

³² See the provision of the A. L. I. Model Code quoted in the preceding footnote. The Commentary to the section explains that the "search envisaged here should not usually be more intensive than an 'external feeling of clothing,' that is, the traditional 'frisk.'" AMERICAN LAW INSTITUTE, MODEL CODE OF PRE-ARRESTMENT PROCEDURE, Commentary on § 2.02, Tentative Draft No. 1, March 1, 1966, at p. 102. Neither the Uniform Arrest Act nor the New York statute restrict the intrusiveness of searches, except perhaps by implication in specifying a weapon as the object of search. But see pp. 50-51, *infra*.

³³ The Uniform Arrest Act, A. L. I. Model Code, and New York statute alike specify a dangerous weapon as the object of permitted search.

seized may also be limited or unlimited.³⁴ The common characteristic of the "frisk" authorizations is that they seek to delimit in some fashion the personal searches that may be made incident to a "stop," but none apparently include within the limitations any requirement of probable cause (in the classical sense) to believe that the person searched has a weapon.

It is relatively clear that the *Classical Arrest-Search Model* was and is the common law of England, which has never permitted detention for investigation nor on less than probable cause.³⁵ The same model has also been

³⁴ Both the Uniform Act and the New York statute give the officer power to seize a weapon. This might appear to exclude power to seize other items found, but of course the New York courts have not given it this effect. The A. L. I. Model Code leaves the question for later resolution.

³⁵ This is the interpretation of the English law by such celebrated scholars of that law as Sir Patrick Devlin and Glanville Williams. See note 18 *supra*. We recognize that some American commentators have purported to find a warrant for detention without probable cause in the old English books. E.g., Kuh, *supra*, note 15. But the authorities upon which they rely, principally *Lawrence v. Hedger*, 3 Taunt. 14, 128 Eng. Rep. 6 (C. P. 1810); 2 HALE, PLEAS OF THE CROWN 89, 96-97 (1st Amer. ed. 1847); 2 HAWKINS, PLEAS OF THE CROWN 118-132 (8th ed. 1824), entirely fail to support any such principle, as the more careful American studies make clear. See Leagre, *supra*, note 15, at 408-411; Comment, *Police Power to Stop, Frisk and Question Suspected Persons*, 65 COLUM. L. REV. 847, 851-852 (1965). The Americans who trace stop-and-frisk to the English books have simply permitted themselves to be confused by the English use of the term "reasonable suspicion" which is not the equivalent of the same form of words used in the Uniform Arrest Act and New York's stop and frisk legislation, but is the equivalent of American constitutional "probable cause." Hale makes this clear enough. See 2 HALE, *op. cit. supra* 76-86, 110. And see Thomas, *Arrest; A General View*, (1966) CRIM. L. REV. 639, and comments following. There does appear to be in English law some patchwork statutory authorization for stops and searches without warrant, rather in the nature of the usual American game-law inspections. Whether probable

invariably assumed by this Court to describe the constitutional law of the Fourth Amendment.³⁶ This is more than historical happenstance. For the root notion of "probable cause" which is mainstay of the model is not simply a long cherished Anglo-American symbol of individual liberty. It is, in view of the practical realities of criminal administration, an inevitable evolutionary product of our system's use of courts to confine police power within reasonable bounds consistent with the conscience of a free people.

cause is required for these is not wholly clear, but it seems to be, see Thomas, *The Law of Search and Seizure; Further Ground for Rationalisation*, (1967) CRIM. L. REV. 3, 11-18, and comments following. In any event, the statutes are of very limited scope, as Glanville Williams has noted. Williams, *supra*, note 18, at 414.

³⁶ *Brinegar v. United States*, 338 U. S. 160 (1949); *Henry v. United States*, 361 U. S. 98 (1959); *Rios v. United States*, 364 U. S. 253 (1960). *Brinegar* explicitly repudiates the grounds of decision of the lower courts in that case, purporting to authorize an automobile stop not amounting to a search on reasonable suspicion not amounting to probable cause. The *Henry* decision is plainly based on the same rejection of the same conception. (We can hardly believe that the Solicitor General's concession as to the point of arrest in *Henry* was dispositive of the view the Court took of the matter.) And *Rios* cannot possibly be read as anything but a repudiation of stop and frisk. Although the force of the decision has been slighted by some, e.g., AMERICAN LAW INSTITUTE, MODEL CODE OF PRE-ARREST PROCEDURE, Commentary on § 2.02, Tentative Draft No. 1, March 1, 1966, at p. 94, the *Rios* opinion is not comprehensible on any other theory. The Government argued at length in *Rios* for the recognition of a power of limited detention without arrest or probable cause. The Court's opinion was written to identify for the lower court on remand the issues posed for its factual resolution. Those issues were, simply, when there occurred an arrest and whether at that time the arresting officers had probable cause. These are the issues framed by the *Classical Arrest-Search Model*, with its two categories of police powers—those given officers with probable cause (including arrest), and those given officers without. If the Court had imagined that the *Stop-Frisk Model* presented an alternatively permissible way of viewing the case, it is simply inconceivable that its opinion would not have identified for the district court the quite distinct issues (involving several degrees of detention, with several accompanying states of justification) posed by that model.

II.

The Genius of Probable Cause.

Whatever uncertainties there may be in the pre-Constitutional history³⁷ and the post-Constitutional evolution of the Fourth Amendment, two core conceptions of the Amendment emerge with indisputable clarity. First, the Amendment's purpose is to restrict the allowance of intrusive police investigative powers to circumstances of *particularized justification*, disallowing police discretion to employ those powers against the citizenry in general. Second, this restriction is enforced by the interposition of *judicial judgment* between the police decision to intrude and the allowability of intrusion.

The first conception is visible upon the face of the Amendment. It is the essential idea that gives meaning both to the requirement of "probable cause" and to the requirement of warrants "particularly describing" the place to be searched, and the things or persons to be seized. Concerning both the occasions and extent of police intrusion upon the individual, "nothing is left to the discretion of the officer. . . ." *Berger v. New York*, — U. S. —, —, 87 S. Ct. 1873, 1883 (1967), quoting *Marron v. United States*, 275 U. S. 192, 196 (1927).

³⁷ The history is canvassed in the *Stanford* and *Marcus* decisions cited *supra*, note 6, and in LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT: A STUDY IN CONSTITUTIONAL INTERPRETATION (Johns Hopkins University Studies in Historical and Political Science, ser. 84, no. 1) 19-48 (1966); LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION (Johns Hopkins University Studies in Historical and Political Science, ser. 40, no. 2) 13-105 (1937); Fraenkel, *Concerning Searches and Seizures*, 34 HARV. L. REV. 361 (1921).

History tells us why. The general warrants and writs of assistance against which the Fourth Amendment was principally aimed were vicious precisely because they "permitted the widest discretion to petty officials."³⁸ "Armed with their roving commission, they set forth in quest of unknown offenders; and unable to take evidence, listened to rumors, idle tales, and curious guesses. They held in their hands the liberty of every man whom they pleased to suspect."³⁹ This practice was doubly damnable. In a society profoundly committed to the liberty of the subject, the notion that government should be given the power to intrude indiscriminately and at the mere will of its officers into the affairs of every citizen was wholly unacceptable. Neither the random visitations of the King's messengers nor the practice in its more terrifying forms as an increasingly powerful bureaucracy might develop it—such as the South African "blitz" described in note 11 *supra*—were to be countenanced in this free country. Government could not invade the province of Everyman. To further its important purposes, including criminal investigation, it might invade the provinces of some individual men, but only those whom circumstances sufficiently distinguished from the generality of men so that the invasion could not be broadside.⁴⁰ The general warrant infringed this concern

³⁸ Fraenkel, *supra*, note 37, at 362.

³⁹ *Stanford v. Texas*, 379 U. S. 476, 483 (1965); quoting 2 MAY'S CONSTITUTIONAL HISTORY OF ENGLAND 246 (Amer. ed. 1864).

⁴⁰ See Patrick Henry in the Virginia Convention, 3 ELLIOT'S DEBATES 588 (2d ed. 1836):

"I feel myself distressed, because the necessity of securing our *personal rights* seems not to have pervaded the minds of men; for many other valuable things are omitted:—for instance, general warrants, by which an officer may search suspected places, without evidence of the commission of a fact,

and was accordingly denounced as a "ridiculous warrant against the whole English nation." ⁴¹

In addition, the unbounded discretion allowed under the general warrants and writs of assistance left government officers free to heed every urging of personal spite, paltry tyranny, arbitrariness and discrimination. "In effect, complete discretion was given to the executing officials; in the words of James Otis, their use 'placed the liberty of every man in the hands of every petty officer.'" ⁴² "The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing, and history shows that the police acting on their own cannot be trusted." ⁴³ So the Fourth Amendment was designed both to delimit the breadth of power and to constrain the possibility of its abuse. Its language sometimes speaks obscurely in the context of twentieth century circumstances, "but this much is certain: there is no authority [in any American gov-

or seize any person without evidence of his crime, ought to be prohibited. As these are admitted, any man may be seized, any property may be taken, in the most arbitrary manner, without any evidence or reason. Every thing the most sacred may be searched and ransacked by the strong hand of power. We have infinitely more reason to dread general warrants here than they have in England, because there, if a person be confined, liberty may be quickly obtained by the writ of *habeas corpus*. But here a man living many hundred miles from the judges may get in prison before he can get that writ."

For a brilliant modern expression of the same concern, with particular reference to police street interrogation, see Reich, *Police Questioning of Law Abiding Citizens*, 75 YALE L. J. 1161 (1966).

⁴¹ *Stanford v. Texas*, 379 U. S. 476, 483 (1965), quoting 2 MAY'S CONSTITUTIONAL HISTORY OF ENGLAND 247 (Amer. ed. 1864).

⁴² *Marcus v. Search Warrant*, 367 U. S. 717, 729 n. 22 (1961), quoting TUDOR, LIFE OF JAMES OTIS 66 (1823).

⁴³ *McDonald v. United States*, 335 U. S. 451, 455-456 (1948).

ernment] for the molestation of all those on whom the long shadow of suspicion falls in the hope that something damaging might turn up in the course of the search."

Not surprisingly, these concerns of the Fourth Amendment converge with others that our society has found essential and given enduring constitutional expression. They deserve to be recalled here, because all are threatened by the *Stop-Frisk Model* of criminal investigative process. The Fifth Amendment Privilege also forbids government to treat suspicion as guilt and to throw upon the citizen the obligation to exculpate or explain himself to a government officer. *Miranda v. Arizona*, 384 U. S. 436 (1966). It denies government power to employ coercive force of any sort (be it brief or extended physical restraint or other means of compulsion) to secure the cooperation of the citizen in pursuing law enforcement efforts that may secure his own criminal conviction. *Ibid.* Lessons to which the First Amendment and the Due Process Clauses of the Fifth and Fourteenth respond have taught us the impermissibility of making law enforcement officers the unconstrained rulers of the streets. *Shuttlesworth v. Birmingham*, 382 U. S. 87 (1965).⁴⁵ And our especial national history has given

⁴⁴ LANDYNSKI, *op. cit. supra*, note 37, at 46.

⁴⁵ "Literally read, . . . the second part of this ordinance says that a person may stand on a public sidewalk in Birmingham only at the whim of any police officer of that city. The constitutional vice of so broad a provision needs no demonstration. It 'does not provide for government by clearly defined laws, but rather for government by the moment-to-moment opinions of a policeman on his beat.' *Cox v. Louisiana*, 379 U. S. 536, 579 (separate opinion of MR. JUSTICE BLACK). Instinct with its ever-present potential for arbitrarily suppressing First Amendment liberties, that kind of law bears the hallmark of the police state." *Id.* at 90-91.

See also *Hague v. C. I. O.*, 307 U. S. 496 (1939); *Thornhill v. Alabama*, 310 U. S. 88 (1940); *Cox v. Louisiana*, 379 U. S. 536 (1965).

us the Equal Protection Clause as a bulwark both against arbitrary and discriminatory abuses of our citizens by government officials,⁴⁶ and against the dangerous generality of governmental authorizations rife with the potential for such abuses.⁴⁷

But the Fourth Amendment, most specifically addressed to protecting these concerns where they may be threatened by powers exercised in the investigative process, provides its own singular procedural mechanism for the necessary accommodation of individual privacy and investigation. That mechanism is judicial review of the police justification offered to support an investigative intrusion. Time and again this Court has repeated the theme:

"The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a

⁴⁶ *Yick Wo v. Hopkins*, 118 U. S. 356 (1886); cf. *Wright v. Georgia*, 373 U. S. 284 (1963).

⁴⁷ *Louisiana v. United States*, 380 U. S. 145 (1965); cf. *Niemotko v. Maryland*, 340 U. S. 268 (1951).

nullity and leave the people's homes secure only in the discretion of police officers."⁴⁸

The Court has insisted upon procedures which assure that the judicial determination will be rendered as an independent judgment, not a mere routine validation of police discretion. See *Aguilar v. Texas*, 378 U. S. 108 (1964). Although the requirement of *prior* judicial authorization of police intrusions has sometimes been excused on considerations of history and practicability, the provision of some available and effective judicial review of the police has always been insisted upon. See *Henry v. United States*, 361 U. S. 98, 104 (1959). Whether the forum be a criminal trial against the individual who claims abuse of the police investigative power, *Mapp v. Ohio*, 367 U. S. 643 (1961), or a damage action by the individual, *Monroe v. Pape*, 365 U. S. 167 (1961), a court sits to provide in the last analysis the "neutral and detached" judgment which the Fourth Amendment commands. This is no less true of arrests than of other searches and seizures. *Beck v. Ohio*, 379 U. S. 89 (1964).

Within this framework, the significance and the unique genius of the "probable cause" concept is apparent. "Probable cause" is not a self-efficient talisman. Nothing depends upon the words themselves. "Probable cause" is not inherently more fit for use than the verbalism "reasonable suspicion" (which the English have long used to serve the same function).⁴⁹ But as it has evolved, probable cause

⁴⁸ *Johnson v. United States*, 333 U. S. 10, 13-14 (1948), quoted in *Chapman v. United States*, 365 U. S. 610, 614-615 (1961). See also LANDYNSKI, *op. cit. supra*, note 37, at 47.

⁴⁹ See note 35 *supra*.

has taken on an operative meaning and efficiency that is inherently fit—indeed, irreplaceable—as an instrument for mediating the demands of order and liberty in criminal investigation. The particular efficacy assigned to it in the *Beck* opinion, *id.* at 91, bears repeating: “[P]robable cause is a practical, non-technical conception affording the best compromise that has been found for accommodating these often opposing interests.”⁵⁰

Probable cause is addressed bluntly to the issue of particularized justification that is the Fourth Amendment’s first principle. As it has developed judicially, the phrase connotes exactly that quantum of evidence pointing to likely or probable guilt that serves to single an individual out reasonably persuasively from the mass of men. It is the standard designed to distinguish him from Everyman with sufficient sureness that, if the individual’s arrest or search be authorized, Everyman’s arrest or search will not be authorized by parity of reasoning.

To serve such a function—to protect the “liberty of every man”⁵¹ from subjection to police discretion—a test must be relatively objective. The probable cause standard seeks precisely to objectify, to regularize, the reasoning process by which the judgment of allowability of police intrusions is made. Of course, no judgmental standard governing an issue of this sort can wholly eliminate the influence of subjective and impressionistic responses—particularly a standard composed for general service in a multitude of varying factual circumstances. And so (as the proponents of the *Stop-Frisk Model* are quick to point out) even the Justices

⁵⁰ See text at note 23 *supra*.

⁵¹ See text at note 42 *supra*.

of this Court have from time to time divided in applying "probable cause" to the facts of one case or another. But the probable cause conception does operate—and its essential design makes it operate with peculiar efficiency—to diminish as much as is institutionally possible the impact of subjective factors.

First, probable cause invokes that traditional juridical device for the depersonalization of judgment; the enforced perspective of the "reasonable man" or "ordinary man." Second, it frames very specifically the question which it purports to submit to the ordinary judgment of the "ordinary man." The question is one of objective factual probabilities: is the individual whose arrest is sought to be justified likely guilty on the perceived facts? No debatable issue of values is expressly submitted. Doubtless, policemen and judges do in fact import some normative considerations into the determination. They may conclude "likely enough guilty," or "not likely enough guilty." But this is a small matter compared to tests (the inevitable instruments of the *Stop-Frisk Model*, as we shall see) which baldly invite consideration of the normative desirability of the particular police practice sought to be justified: "Is the suspect likely enough guilty so that he should be arrested?" "Is he likely enough guilty so that he should not be arrested, but should be detained?" There are no answers to such questions that do not turn almost entirely upon one's personal approval or disapproval of arrest or of detention.

Third, probable cause speaks to policeman's, to the judge's and to the citizen's common thought processes as rational men. Although it may take account of the specialized knowledge and the expert perceptual acuity of the policeman (to the extent that these can be objectified and com-

municated to a court), it subjects them to review by ordinary judgment operating upon objective facts. It avoids the dangerous mysticism of police professional, and professionally motivated, intuition—what Mr. Justice Jackson recognized as the mobilized mentality of “the officer engaged in the often competitive enterprise of ferreting out crime.”⁵² (We shall discuss the characteristics of that mentality more fully in the next section of this brief.) Probable cause therefore directs the judge toward an exercise of independent and autonomous judgment, properly responsive to the policeman’s expert capacity for observation and induction, but freed from the controlling imposition of police value judgments or from necessary reliance upon the policeman’s inexplicable “hunches” which inevitably embody those value judgments.

In short, probable cause is a common denominator for police, judicial and citizen judgment. It permits the judge, after hearing the officer’s account of his observations and his inferences from them, to pass a detached, independent and objective judgment on the rationality of those inferences. It permits the judge to express his judgment in terms that are more or less comprehensible to the police, for their future guidance. The same terms are more or less accessible to the citizen who wants to know his rights or to pass political judgment in turn upon a system which functions as the probable cause system does.⁵³ This is not to

⁵² See text at note 48 *supra*.

⁵³ One of the attorneys for *amicus curiae* has been for a while adviser to a law student program under which students teach an eight-week course in basic legal rights to ghetto-area high school children in a large Eastern city. The law students report that the concept of “probable cause” is one of the easiest to communicate to their pupils. Even children who have endless complaints to

say that "probable cause" functions unerringly, or with perfect clarity. Of course, it does not. No standard for the case-by-case determination of the legitimacy of police investigative intrusions could. But the very failings of "probable cause" in this regard, together with its relative successes, caution against its abandonment in favor of more arcane, more impressionistic, less objective, less historically developed standards. It should not be forgotten that probable cause is the *only* standard which this Court has ever developed under the Fourth Amendment for judicial regulation of the police.⁵⁴ We think that the nature of the

voice about real or supposed police mistreatment (and this appears to be the case for a very large number of the children) are able to appreciate and will admit the legitimacy of police stops, arrests and searches of "innocent" people where appearances of guilt amounting to probable cause (as developed by discussion of hypothetical cases) exist.

⁵⁴ Probable cause is, of course, the constitutional standard for the issuance of both search warrants, *Aguilar v. Texas*, 378 U. S. 108 (1964), and arrest warrants, *Giordenello v. United States*, 357 U. S. 480 (1958) (constitutionalized in *Aguilar, supra*). Warrantless searches may be made only in a handful of historically defined situations (see *Jones v. United States*, 357 U. S. 493 (1958); *Chapman v. United States*, 365 U. S. 610 (1961); *Stoner v. California*, 376 U. S. 483 (1964); *Berger v. New York*, — U. S. —, 87 S. Ct. 1873 (1967)): incident to a valid arrest (in which case, of course, probable cause is required for the arrest; and cf. *Cooper v. California*, 376 U. S. 58 (1967)); in the case of moving vehicles (where probable cause is required, see *Carroll v. United States*, 267 U. S. 132 (1925); *Henry v. United States*, 361 U. S. 98, 104 (1959)); and in certain emergencies or "exigent circumstances" where there is no time to obtain a warrant (in which case, the existence of the criminal circumstances creating the emergency must be established by probable cause, *Schmierber v. California*, 384 U. S. 575 (1966); cf. *Warden v. Hayden*, — U. S. —, 87 S. Ct. 1642 (1967)). (We put aside the consent doctrine, bottomed on a theory of waiver, see *Stoner v. California, supra*.) Although warrantless arrests may be made under a greater range of circumstances than warrantless searches, the constitutional standard for warrantless arrest is also probable cause. *Wong Sun*

concept and the setting of its use as we have just described them demonstrate the inevitably, as well as the wisdom, of this development. We turn now to the "reasonable suspicion" construct with which the *Stop and Frisk Model* undertakes—for partial but vitally important purposes—to displace probable cause.

III.

The Deceptive Allure of "Reasonable Suspicion."

At first blush, the argument for a *Stop-Frisk Model* of criminal investigation, controlled by the standard of "reasonable suspicion," seems eminently, beguilingly reason-

v. *United States*, 371 U. S. 471 (1963); *Beck v. Ohio*, 379 U. S. 89 (1964). In *Brinegar v. United States*, 338 U. S. 160 (1949), the Court explicitly rejected the argument that warrantless stops of automobiles (amounting, in the view of the courts below, to less than "searches") could be made without probable cause. And the Court has recently extended the warrant requirement, with its probable cause constraint, to some sorts of non-criminal regulatory searches. *Camara v. Municipal Court*, — U. S. —, 87 S. Ct. 1727 (1967). In the latter cases, "probable cause" may not necessarily mean probability of individual culpability, as it does in the criminal area (see *Berger v. New York*, *supra*), but it does preserve its individualizing function, requiring scrutiny to assure "that reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling," 87 S. Ct. at 1736.

The only exception to the probable cause requirement in this Court's jurisprudence touching law enforcement practices is the "border search" doctrine announced in dictum in the *Carroll* case, *supra*. In that area, no form of judicial regulation was intended by the Court be substituted for probable cause, nor has any such regulation developed. Customs and immigration officials at the border are simply permitted to search as and when they will. E.g., *Blefare v. United States*, 362 F. 2d 870 (9th Cir. 1966). The unique justifications for that principle range too far afield to justify discussion here.

able.⁵⁵ Surely, say the proponents of stop and frisk, our inherited notions of "arrest" and "search" and "probable cause" are too dogmatic, too inflexible. Not all police intrusions are equally intrusive. Therefore, the same degree

⁵⁵ The argument which we address in text is that which seems to have persuaded the New York and Ohio courts, and which is expounded by the most persuasive proponents of stop and frisk. There is also another argument frequently made to square the *Stop-Frisk Model* with the Fourth Amendment which is so palpably insubstantial as not to require extended answer. This argument goes: (1) The Fourth Amendment requires probable cause for an "arrest"; (2) an "arrest" is "the taking of a person into custody in order that he may be forthcoming to answer for an offense" (quoting AMERICAN LAW INSTITUTE, ⁹CODE OF CRIMINAL PROCEDURE, § 18, Official Draft, June 15, 1930, or some similar text); (3) but a "stop" (or an "arrest for investigation") lacks the *charging purpose* of an "arrest" (i.e., the person detained is not detained "in order that he may be forthcoming to answer"); (4) therefore, a "stop" is not an "arrest"; (5) hence, a "stop" may be made without probable cause. There are three things wrong with this argument. (A) *Its premise is wrong*. Common-law doctrine did not require "charging purpose" as an element of an arrest. It is true that some criminal procedure codes *authorized* an arrest only for the purpose of charging a citizen with crime. (Not even all of these, it should be noted, including "charging purpose" in their definitions of "arrest," as the A. L. I. Code commentary recognizes, see *id.* at 227-228.) But the body of common-law lore whose purpose was to define the citizen's right against arrest—the tort law of false imprisonment—treated any restraint of liberty, whether with or without charging purpose, as an arrest. See Mascolo, *The Role of Functional Observation in the Law of Search and Seizure: A Study in Misconception*, 71 DICK. L. REV. 379, 390-391 (1967); Note, *Philadelphia Police Practices and the Law of Arrest*, 100 U. PA. L. REV. 1182, 1185-1188 (1952). (B) *Its conclusion does not follow from its premise*. Even were it true that a common-law "arrest" required *charging purpose*, it would not follow that a detention without charging purpose was legal at common law. The point which the argument misses is that, at common law, the *only* detention that was lawful at all was one which an officer (or private citizen) could justify under his privilege of arrest. See Remington, *supra*, note 15, at 387. The common law gave no power, *with or without probable cause*, to detain any person for any purpose other than to charge him with an offense. See note 18, *supra*. So, if a "stop" is distinguished from

of justification should not be demanded for all. "The attempt to apply a single standard of probable cause to all [police] interferences [with individual privacy and liberty]—i.e., to treat a stop as an arrest and a frisk as a search—produces a standard either so strict that reasonable and necessary police work becomes unlawful or so diluted that the individual is not adequately protected."⁵⁶ Far more sensible, far more realistic, is the accommodating approach of "balancing" the extent of each particular police intrusion against the extent of its justification. This "balancing" approach (which seems to have been borrowed from the First Amendment area without carrying along the First Amendment's strong preference for individual freedom) finds its most articulate expression in Dean Edward L. Barrett's often quoted suggestion:

"Would not the policy of the Fourth Amendment be better served by an approach which determines the reasonableness of each [police] investigative technique

an "arrest" by the absence of charging purpose, the consequence is not that it is lawful without probable cause, but that it is unlawful even with probable cause. Thus it has been held under the Fourth Amendment in the case of "arrest for investigation," *Staples v. United States*, 320 F. 2d 817 (5th Cir. 1963), and thus it is, for the same reason, in the case of a "stop" which is sought to be distinguished from arrest only by the absence of charging purpose. (C) *Its conclusion is irrelevant in any event.* This is so, of course, because the restrictions of the Fourth Amendment are not cast in terms of "arrest." They are cast in terms of "seizures" of the person. An "arrest" is a seizure of the person, but so is any other seizure, for whatever purpose. The "charging purpose" argument, essentially a verbal quibble, is adequately laid to rest in Foote, *The Fourth Amendment: Obstacle or Necessity in the Law of Arrest*, 51 J. CRIM. L., CRIM. & POL. SCI. 402, 403-404 (1960).

⁵⁶ Judge Keating for the Court of Appeals in *Peters*. See *People v. Peters*, 18 N. Y. 2d 238, 219 N. E. 2d 595, 600 (1966).

by balancing the seriousness of the suspected crime and the degree of reasonable suspicion possessed by the police against the magnitude of the invasion of the personal security and property rights of the individual involved?"⁵⁷

The answer to that provocative question, *amicus curiae* submits, is a flat and unequivocal No. However intellectually reasonable Dean Barrett's balancing approach may be in the corridors of academe, it is a delusive and unworkable proposition on the streets of our cities, and particularly on the streets of our ghettos where stop-frisk logic does its daily work. Closely inspected, we believe, both the "balancing" theory of Fourth Amendment rights and the *Stop-Frisk Model* that is built upon it show themselves to be mere fine, scholastic pretexts for oppression. The "minor interference with personal liberty"⁵⁸ that they sanction is a major interference; the protections which they promise are unreal illusions; the "balance" scale which they purport to employ is invariably tipped by the police commissioner's thumb; and their consequence is nothing more or less than a police dictatorship of the streets. We urge this Court to repudiate any such triflings with the vital freedoms secured by the Fourth Amendment, and to respond as it did nearly one hundred years ago when asked to approve another like "minor" invasion of those same freedoms:

"It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and un-

⁵⁷ Barrett, *Personal Rights, Property Rights, and the Fourth Amendment* [1960], SUPREME COURT REV. 46, 63.

⁵⁸ Chief Judge Silbert for the Court of Appeals in *Terry*. See *State v. Terry*, 5 Ohio App. 2d 122, 214 N. E. 2d 114, 118 (1966).

constitutional practices get their first footing in that way, namely: by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. . . . It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principis*."⁵⁹

Let us examine first the nature of the "minor" invasion of liberty involved. Proponents of the "stop" like to portray it as though it consisted at worst of a police "Hey, there." Several points should be obvious about this "Hey, there."

(1) "Hey, there" itself, when said by a policeman, is a significant intrusion, except perhaps to those fortunate citizens whose sole image of the police is a vague memory of the friendly face of the school crossing guard. Such citizens are not very often stopped. "Hey, there" to the man likely to be stopped—the man on the street in a "bad" neighborhood, the man in the ghetto—is a challenge, an act of dominion by the Fuzz, a thinly veiled threat of force.

(2) "Hey, there" may or may not be thought unduly intrusive—once. But the man likely to be stopped is not likely to be stopped once. He is likely to be stopped again, and again, day in day out, and for the same reasons. The following comment of a "lower income Negro," which the

⁵⁹ *Boyd v. United States*, 116 U. S. 616, 635 (1886).

National Crime Commission's Task Force on Police thought worthy of publication, is a perfectly representative picture of ghetto life—and resultant ghetto attitudes:

"When they stop everybody, they say, well, they haven't seen you around, you know, they want to get to know your name, and all this. I can see them stopping you one time, but the same police stopping you every other day, and asking you the same old question."⁶⁰

(3) "Hey, there" looks better on paper than it sounds on the streets. (We put aside the consideration that it is almost invariably "Hey, there, *boy*" in the ghetto.⁶¹) "Field interrogation procedure" is thus described (at its mildest) in an instructional article for police:

"... Meeting head-on. Let the subject get up even with you or slightly beyond you. Then turn toward the subject facing his side. Your hand should either be holding onto the subject's arm at the elbow or in a ready position so that you will be able to spin him forward and away from you in a defensive move. This is the position of interrogation. You should make

⁶⁰ PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE 184 (1967).

⁶¹ See CRAY, *op. cit. supra*, note 1, at 193; SKOLNICK, *op. cit. supra*, note 3, at 80-82. The Crime Commission Task Force found that "field interrogations are frequently conducted in a discourteous or otherwise offensive manner, which is particularly irritating to the citizen." PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE 185 (1967). An underlying study found that "*Brusqueness or nastiness was evident in the approaches more often than was courtesy.*" 2 University of Michigan Study 97 (emphasis in original).

a habit of interrogating from this position. Your greatest hazard is the unknown."⁶²

(4) The method of police approach just described, the power of the policeman to make "Hey there" sound like a threat, and the inevitable citizen response together make the "stop" power a *de facto* arrest power. The pattern can be observed daily on any ghetto street. The policeman on "aggressive patrol" (as it is coming to be known in police circles) makes his approach; the citizen, touched on the elbow or startled by the voice at his side and the policeman with his hands up, raises an arm slightly in an instinctive defensive gesture; the policeman is now free to arrest him for assaulting an officer, obstructing an officer, etc.⁶³ Every policeman on the beat knows that the power to make an enforced stop is the power to escalate the episode into a technical "assault" and to make an arrest for the assault. The ghetto resident knows it too—although he is seldom clever and dispassionate enough to avoid the trick.

(5) In any event, the authority which the proponents of "stop" seek to give the police is not the authority to say "Hey, there." It is the authority to *detain* the citizen who does not stop when "Hey, there" is said. It is the power to order him to a stand-still, and to lay hands on him if he moves. It is the power, in the American Law Institute's draft Model Code, to use all force short of deadly force to stop him. We do not know that New York or Ohio law embodies even that humane limitation. Assum-

⁶² Adams, *Field Interrogations*, 7 POLICE 26, 28 (1963).

⁶³ One version of the pattern is described in CRAY, *op. cit. supra*, note 1, at 124-125.

ing that it does, the "stop" power ranges from a hand on the sleeve to a tackle, a patrol car careening up on the sidewalk, a bullet in the citizen's leg. It must be thus, we are informed, because "it would be frustrating and humiliating to the officer, to grant him an authority to order persons to stop, and then ask him to stand by while his order is flouted."⁶⁴

(6) Finally, the "stop" power comports the "frisk" power. The argumentation of the proponents of stop and frisk is, in this regard, wonderfully devious. We are told that "stop" should be allowed without probable cause because it is not very intrusive; and, in support of this proposition, the attributes of "stop" alone are described (or partially described). Invariably, we are later told that the "frisk" power is absolutely indispensable to the safe exercise of the police power to "stop"; hence, that once the power to "stop" is given, the power to "frisk" must follow.⁶⁵ We suggest that this is chop-logic. If "frisk" is indeed the necessary accoutrement of "stop," we think it obvious that the kind of intrusion involved in "frisk" must be taken into account in the initial determination whether "stop" is, indeed, not very intrusive. We think that the intrusiveness of "frisk" hardly needs demonstration.

We pass next to the supposed safeguard of stop and frisk—the preventive against its abuse—the prerequisite of "reasonable suspicion." Used as the English use it, the phrase means "probable cause" in the American con-

⁶⁴ AMERICAN LAW INSTITUTE, MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE, Commentary to § 2.02, Tentative Draft No. 1, March 1, 1966, at p. 100.

⁶⁵ See note 29 *supra*.

stitutional sense.⁶⁶ But where it is used to mean something less than probable cause, as it is in the *Stop-Frisk Model*, what exactly does it mean? It seems to mean, under Dean Barrett's balancing formula, the degree of suspicion which is sufficient so that the police *ought* to be allowed to do whatever it is they do, in light of its intrusiveness. That is a simply impossible test, depending as it does upon the normative appraisal of the policeman himself in the first instance and (in the few cases that come to court) upon the retrospective, subjective and impressionistic judgment of a lower-court judge who has before him a defendant caught with the goods. It should not be forgotten that this Court does not sit to decide every search-and-seizure case in this country, still less every stop-and-frisk case, still less every *instance* of stop and frisk. With all due deference, we suggest that the liberty of the citizen in the street would be a meaningless thing if it were committed almost wholly to *ad hoc* police and criminal court determinations of the normative propriety of particular police intrusions.

One careful student of stop and frisk has offered the conception that "reasonable suspicion" is something more objective. "If probable cause . . . can be defined as a reasonable belief in the probability that a crime has been committed [and, to justify an arrest, that a particular citizen has committed it], . . . [reasonable suspicion] means that it must be reasonably possible that the individual has committed some crime."⁶⁷ But as to what citizen is it not reasonably possible that he has committed some crime? As to what unknown citizen on the street (even a crowded street) near the scene of a known crime? As to what group

⁶⁶ See note 35 *supra*.

⁶⁷ Leagre, *supra*, note 15, at 413.

of ill-dressed young men on a ghetto street corner? As to what Negro abroad on the streets in a "white" neighborhood late in the day? Surely, it is reasonably possible that each of these has committed a crime (or is about to commit one, as the New York statute and common *Stop-Frisk* logic provide). "The finger of suspicion is a long one. In an individual case it may point to all of a certain race, age group or locale. Commonly it extends to any who have committed similar crimes in the past. Arrest on mere suspicion collides violently with the basic human right of liberty. It can be tolerated only in a society which is willing to concede to its government powers which history and experience teach are the inevitable accoutrements of tyranny."⁶⁸

Speaking for the New York Court of Appeals in *Peters*, Judge Keating assures us that "Where a person's activities are *perfectly normal*, he is fully protected from any detention or search."⁶⁹ That is hardly very reassuring.⁷⁰ It is still less reassuring when it is announced that "By requiring the 'reasonable suspicion' of a police officer, the statute incorporates the experienced officer's intuitive knowledge and appraisal of the appearances of criminal activity."⁷¹ Yet here, we suggest, Judge Keating has laid his finger precisely on the pulse of "reasonable suspicion"

⁶⁸ Hogan & Snee, *The McNabb-Mallory Rule: Its Rise, Rationale and Rescue*, 47 GEO. L. J. 1, 22 (1958).

⁶⁹ *People v. Peters*, 18 N. Y. 2d 238, 219 N. E. 2d 595, 600 (1966) (emphasis added).

⁷⁰ It also appears not to be an accurate statement of common stop and frisk law or practice. See the discussion of Pennsylvania's *Hicks* case, *infra*.

⁷¹ *People v. Peters*, 18 N. Y. 2d 238, 219 N. E. 2d 595, 599 (1966).

and given the best available sententious description of its character.

For the native quality of "reasonable suspicion"—as opposed to the "probable cause" concept which our constitutional law has heretofore developed—consists precisely in judicial recognition of the trained police "hunch" or "intuition," without more, as the basis for legitimating police action.⁷² All of the mysticism of police expertise, of police "feel" for a street situation, is invoked here.⁷³ Judges are not expected to detach themselves from the reasoning processes of the police. They are not to take an independent view of police logic. They are to assimilate police logic

⁷² See, e.g., *Goss v. State*, 390 P. 2d 220 (Alaska, 1964) (sustaining stop of automobile on nothing more than policeman's testimony that he observed it under the following "suspicious circumstances": it pulled away from the side of a commercial building at 12:45 a.m. and drove one-half block without lights); *People v. Beverly*, 200 Cal. App. 2d 119, 19 Cal. Rptr. 67 (D. C. A. 1962) (sustaining stop of automobile on nothing more than policeman's testimony that "it was kind of unusual for a car to be coming out of that area [a street occupied primarily by automobile wreckers] at that time [9:33 p.m.] . . . all the auto wreckers at that time is usually closed," 19 Cal. Rptr. at 69); *Commonwealth v. Hicks*, 209 Pa. Super. 1, 223 A. 2d 873 (1966) (sustaining stop and frisk of pedestrian on downtown street at 4:30 p.m. on ground that policemen observed him five blocks from the scene of a burglary; the burglar was reported to be a Negro with a brown coat and mustache; pedestrian was a Negro with a light-colored coat needing a shave).

⁷³ See TIFFANY, MCINTYRE & ROTENBERG, *op. cit. supra*, note 15, at 40:

"Training officers and officers in command of patrol forces commonly urge patrol officers to rely on their own good sense and to learn which persons should be stopped and questioned from their own experiences in the field. Some police assert that it is not possible to express, in a meaningful way, the basis for the conclusion that the circumstances are sufficiently suspicious to justify a field interrogation. It is said that the officer must be 'beat' or 'alley-wise.'"

and appraise the officer's work product by its lights. They are to accept the attitudes of police intelligence for the purpose of adjudging the soundness of police guesswork—exclusively in cases, of course, where that guesswork has already proved itself right. Sound police intuition thus becomes the measure of the citizen's protection under the Fourth Amendment.

What exactly is the nature of that intuition? Jerome Skolnick's recent systematic observation of the police confirms the obvious:

"[T]he policeman's role contains two principal variables, danger and authority, which should be interpreted in light of a 'constant' pressure to appear efficient. The element of danger seems to make the policeman especially attentive to signs indicating a potential for violence and lawbreaking. As a result, the policeman is generally a 'suspicious' person.

"

"However complex the motives aroused by the element of danger, its consequences for sustaining police culture are unambiguous. This element requires him, like the combat soldier, the European Jew, the South African (white or black), to live in a world straining toward duality, and suggesting danger when 'they' are perceived. Consequently, it is in the nature of the policeman's situation that his conception of order emphasize regularity and predictability. It is, therefore, a conception shaped by persistent *suspicion*. . . .

"Policemen are indeed specifically *trained* to be suspicious, to perceive events or changes in the physical

surroundings that indicate the occurrence or probability of disorder. . . ."⁷⁴

⁷⁴ SKOLNICK, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY 44, 47-48 (1966) (emphasis in original). See generally, *id.* at 42-48, 54, 59, 64-65, 83, 206-207, 217-218, 220, 232. Skolnick's observations were made in Oakland, California (sub nom. "Westville"), which has a particularly good and enlightened police department. *Id.* at 25, 32, 62. The observations are tersely summarized by Geoffrey Hazard, of the American Bar Foundation:

" . . . The chief environmental influence on police work is a sensitization to dangerous behavior. Dealing with dangerous behavior is at the same time the unique characteristic and the special responsibility of the police. This orientation to danger results in a peculiar type of social perception. If one's job is to deal with violence should it arise, it is both natural and prudent to develop an alertness for signs of violence. People incipient upon violence give off signs of their mood—agitation, loud and excited speech, changes in posture and position in preparation for action, and the like. The skill of the police is to notice these signs and to react to them. Of course, such signs are also emitted by people who are just naturally agitated, loud-mouthed, or shifty, and it is often difficult to tell what behavioral signs portend. The point is that, because they have special responsibilities, the police read these signs—and others more subtle—in a way that other people do not. Compared to other people, they seem to have an anxiety neurosis, as indeed in a relative sense they do.

" . . . Beginning with the fact that deviance may be a sign of danger, the police tend to see all deviance as dangerous. Policemen's work thus tends to make policemen socially conservative in the most fundamental sense. This has all sorts of consequences. For one thing, it helps to explain the strong negative responses that the police tend to display toward such events as picketing, wearing beards and sandals, and other socially disassociative activities. For another, and perhaps more practically significant, the police are inclined to classify as crime all behavior that they see as discrepant with 'ordinary' behavior, regardless of whether such behavior is technically a violation of law. This inclination is, of course, checked by other pressures—political, social, and legal—so

This suspicious cast of mind is intensified in the ghetto. The policeman on patrol in the inner city has little understanding of the way of life of the people he observes, and he believes (with considerable justification)⁷⁵ that they are hostile to him.⁷⁶ The result is inevitable. "The patrolman

that the police in operation do not fulfill their inclinations. The policeman's tendency to regard all deviance as crime is, however, a real and largely uncontrollable social force."

Hazard, *Book Review*, 34 U. CHI. L. REV. 226, 228-229 (1966). See also Schwartz (Herman), "Stop and Frisk" in *New York Law and Practice: A Case Study in the Abdication of Judicial Control Over the Police* (unpublished manuscript) 29-31, and authorities cited.

⁷⁵ "The hatred and fear of the police, whether overt or hidden, felt by many Negroes, Puerto Ricans and Mexican-Americans cannot be overstated." AMERICAN CIVIL LIBERTIES UNION, POLICE POWER AND CITIZENS' RIGHTS 11 (1967). See also REPORT OF THE PRESIDENT'S COMMISSION ON CRIME IN THE DISTRICT OF COLUMBIA ON THE METROPOLITAN POLICE DEPARTMENT 62-65 (1966); Cross, *The Negro, Prejudice and the Police*, 55 J. CRIM. L., CRIM. & POL. SCI. 405, 407 (1964). Stop and frisk practice, of course, is a not inconsiderable part of the complex causes for this hatred and fear. See notes 108-10 *infra*.

⁷⁶ See BALDWIN, *NOBODY KNOWS MY NAME* 61-62 (Dell ed. 1963):

"... None of the Police Commissioner's men, even with the best will in the world, have any way of understanding the lives led by the people they swagger about in twos and threes controlling. ...

"... [The policeman] is facing, daily and nightly, people who would gladly see him dead, and he knows it. There is no way for him not to know it; there are few things under heaven more unnerving than the silent, accumulating contempt and hatred of a people. He moves through Harlem, therefore, like an occupying soldier in a bitterly hostile country; which is precisely what, and where, he is, and the reason he walks in twos and threes. And he is not the only one who knows why he is always in company: the people who are watching him know why, too. ..."

See also Brooks, *New York's Finest*, 40 COMMENTARY 29, 29-32 (Aug. 1965).

in Westville, and probably in most communities, has come to identify the black man with danger"⁷⁷ Little wonder that "field interrogations are sometimes used in a way which discriminates against minority groups, the poor, and the juvenile."⁷⁸

This is not an isolated or ephemeral abuse,⁷⁹ nor one that courts can control under the rubric of "reasonable suspicion." Can any court say that the policeman is *not* reasonably suspicious of the group of young men lounging on the ghetto corner? Of the man on parole for narcotics violations who consorts with another? Of the man walking at night with two companions who have records for robbery? Of the interracial couple in the neighborhood frequented by prostitutes? A police authority on field interrogation gives policemen this advice respecting the "selection of subjects":

"A. Be suspicious. This is a healthy police attitude, but it should be controlled and not too obvious. [*Sic.*]

"B. Look for the unusual.

1. Persons who do not 'belong' where they are observed.
2. Automobiles which do not 'look right.'
3. Businesses opened at odd hours, or not according to routine or custom.

⁷⁷ SKOLNICK, *op. cit. supra*, note 74, at 49.

⁷⁸ PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE 184 (1967).

⁷⁹ See note 3 *supra*.

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"C. Subjects who should be subjected to field interrogations.

...

1. Suspicious persons known to the officer from previous arrests, field interrogations, and observations.

...

4. Any person observed in the immediate vicinity of a crime very recently committed or reported as 'in progress.'

5. Known trouble-makers near large gatherings.

6. Persons who attempt to avoid or evade the officer.

7. Exaggerated unconcern over contact with the officer.

8. Visibly 'rattled' when near the policeman.⁸⁰

9. Unescorted women or young girls in public places, particularly at night in such places as cafes, bars, bus and train depots, or street corners.

...

20. Many others. How about your own personal experiences?"⁸¹

⁸⁰ There doubtless is some safe middle ground between showing exaggerated unconcern for the officer and being visibly rattled in his presence, but one wonders how many inhabitants of our cities are sufficiently astute students of the police mind to find that ground. The same damned-if-you-do, damned-if-you-don't dilemma is presented in BRISTOW, *op. cit. infra*, note 81, at 15.

⁸¹ Adams, *Field Interrogation*, 7 POLICE 26, 28 (March-April 1963). Similar generalizations are found in the leading texts. BRISTOW, *FIELD INTERROGATION* 13-19, 23, 31-46 (2d ed. 1964);

Is a judge to say that these bases of suspicion are unreasonable? How, in any meaningful way, is he to review a police "stop" based on any of them?

The answer to this question is evident from the reports. The courts have not in fact imposed any limitations or restrictions upon the stop and frisk power once that power is granted. They have not done so because they could not do so—because the essence of the doctrine of stop and frisk on less than probable cause is judicial abdication to police judgment. The judicial decisions demonstrate trenchantly the practical unworkability of the *Stop-Frisk Model*. New York's cases will serve as an example.⁸²

As we shall see, the major failing of the cases is that "reasonable suspicion" has proved to be a broad, all-purpose rubber stamp for validating police intrusions. Before passing to that point, however, we pause to examine the nature of the intrusions which the New York cases allow upon "reasonable suspicion." What appears from such examination is a thorough vindication of the most dire predictions of those commentators who warned that no mere wordplay

PAYTON, *PATROL PROCEDURE* 179-188, 190-195 (1966). TIFFANY, MCINTYRE & ROTENBERG, *op. cit. supra*, note 15, at 38-43, remark the failure of police departments generally to develop standards governing field interrogation and related practices. Bristow rather explicitly gives up the attempt: "The question of what is suspicious cannot be answered for the individual patrolman. Each officer must seek this answer for himself on a basis of his knowledge of the area. BRISTOW, *op. cit. supra*, at 19.

⁸² The only other jurisdiction which has had substantial case-law development of the stop and frisk conception is California. The decisions there make up a pattern much like New York's. The cases are discussed in Note, *Stop and Frisk in California*, 18 HASTINGS L. J. 623 (1967).

could make a "stop" something less than an arrest, or "frisk" something less than a search.⁸³

"The stopping of the individual to inquire is not an arrest," the New York Court of Appeals announced in its first stop and frisk decision, explaining why "the ground upon which the police may make the inquiry may be less incriminating than the ground for an arrest" *People v. Rivera*, 14 N. Y. 2d 441, 445, 201 N. E. 2d 32 (1964). Yet within two years, in the *Peters* case now before this Court, the Court of Appeals was prepared to sanction as a "stop" something that seems to all appearances a quite conventional arrest. A police officer collared Peters at gunpoint on a stairway between floors of a private apartment building. He tugged Peters down a flight of stairs to the next floor where he questioned him. He then felt his clothing, removed an opaque packet, took it out of Peters' reach, and searched it. About all that is wanting here to exhaust the powers ordinarily given an officer who makes an arrest is a trip to the precinct station. The question of the propriety of such a trip was not reached in *Peters* because the "frisk" had served its purpose. It had disclosed the making of a *de jure* arrest, which followed. In any event, the Court of Appeals had already made clear in *People v. Pugach*, 15 N. Y. 2d 65, 204 N. E. 2d 176 (1964), that the "stop" power alone included a trip to the precinct station, if the officer found that desirable. *Accord*:

⁸³ CRAY, *op. cit. supra*, note 1, at 38; Foote, *Law and Police Practice: Safeguards in the Law of Arrest*, 52 NW. U. L. REV. 16, 37-38 (1957); Foote, *The Fourth Amendment: Obstacle or Necessity in the Law of Arrest*, 51 J. CRIM. L., CRIM. & POL. SCI. 402, 403-405, (1960); Souris, *Stop and Frisk or Arrest and Search—The Use and Misuse of Euphemisms*, 57 J. CRIM. L., CRIM. & POL. SCI. 251 (1966).

People v. Hoffman, 24 App. Div. 2d 497, 261 N. Y. S. 2d 651 (1965).

"The frisk is less . . . invasion [of privacy] than an initial full search of the person would be." So held *People v. Rivera*, *supra*, 14 N. Y. 2d at 446, reasoning that it "ought to be distinguishable also on pragmatic grounds from the degree of constitutional protection that would surround a full-blown search of the person." *Ibid.* However valid this proposition,⁸⁴ its endurance was fleeting. In *Pugach*, *supra*, the Court of Appeals sustained as a "frisk" the searching of a brief case which police officers had taken from their "stopped" suspect in a squad car en route to the precinct station.⁸⁵ *Peters*, we have seen, sustained the search of an opaque packet taken from the suspect and wholly within the control of an armed policeman. *Sibron* sustained a policeman who "without first frisking the defendant, reached into his pocket and pulled out . . . nar-

⁸⁴ Consider the frisk described by police testimony in the record in *People v. Hoffman*, *supra*, as recorded by Schwartz, *supra*, note 74, at 6:

"I asked both the defendant and his passenger to put their hands on the roof of the police car and I started from their necks and worked across their shoulders and under their arms (indicating) all the way down their sides and down each leg to determine whether they could possibly have a weapon on them or not."

Schwartz reports on the basis of conversations with police that "the procedure employed in *Hoffman* is 'customary usage.'" *Id.*, at note 14. That report concurs with the procedures recommended for policemen in PAYTON, *op. cit. supra*, note 81, at 224-228 (with photographs). Cf. TIFFANY, MCINTYRE & ROTENBERG, *op. cit. supra*, note 15, at 46-48.

⁸⁵ Compare *United States v. Margeson*, 259 F. Supp. 256 (E. D. Pa. 1966); *Commonwealth v. Lehan*, 347 Mass. 197, 196 N. E. 2d 840 (1964).

cotics.”⁸⁶ Lower New York courts have gone further. *People v. Reason*, 52 Misc. 2d 425, 276 N. Y. S. 2d 196 (Sup. Ct. 1966), authorizes search of a tin box standing atop a pile of other articles on the sidewalk near the suspect. *People v. Cassesse*, 47 Misc. 2d 1031, 263 N. Y. S. 2d 734 (Sup. Ct. 1965) (alternative ground), holds that a frisk may encompass the search of an automobile in which the “stopped” suspect is riding.⁸⁷ There is no need to put our own characterization on this New York evolution of the “frisk.” The Court of Appeals has recently reviewed its prior decisions and, explicitly recognizing that in *Pugach*, *Sibron* and *Peters* “the arresting [sic] officers engaged in ‘searches’ rather than ‘frisks’ in order to obtain inculpat- ing evidence,” nevertheless adhered to those holdings. *People v. Taggart*, C. A. N. Y., App. T. 2, No. 120, decided July 7, 1967.

It is significant that the New York courts have been as unable to restrain police subversion of the purpose of the “frisks” that they have authorized as to contain their extent or intrusiveness. Although the New York statute authorizes only a search for weapons, and the Court of Appeals in sustaining its constitutionality continues to stress that concept,⁸⁸ the police ignore it with impunity. The officer in *Sibron*, for example, had no concern with weapons. He suspected Sibron of narcotics dealings, asked him for narcotics, and searched him for narcotics. Indeed, he was so little concerned with his own self-protection, that he let Sibron go into his pocket.⁸⁹ This is

⁸⁶ *People v. Taggart*, C. A. N. Y., App. T. 2, No. 120, decided July 7, 1967, slip opinion, p. 6 (describing *Sibron*).

⁸⁷ Compare *People v. Mickelson*, 59 Cal. 2d 448, 380 P. 2d 658 (1963).

⁸⁸ See *People v. Reason*, *supra*, for a similar case.

apparently no rare practice. The National Crime Commission Task Force on Police reports that "In some cities, searches are made in a high proportion of instances not for the purpose of protecting the officer but to obtain drugs or other incriminating evidence. In New York, for example, where searches are permitted only when the officer reasonably believes he is in bodily danger, searches were made in 81.6 percent of stops reported."⁸⁹

Particularly as the scope of permissible "stop" and "frisk" expanded, and as evidence of their use as pretexts to justify plainly illicit searches accumulated, one might have expected the Court of Appeals to tighten up on the standards for "reasonable suspicion." It has not been able to do so. In the first place, the statutory requirement for a "frisk," that the officer "reasonably suspects . . . he is in danger of life or limb," has been entirely abrogated by the New York Court. This has been done by recognizing what appears to be a conclusive presumption that officers making a "stop" are always in danger.⁹⁰ Such might very well be doubtful as a fact,⁹¹ but surely the Court of Ap-

⁸⁹ PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE 185 (1967).

⁹⁰ "The answer to the question propounded by the policeman may be a bullet; in any case the exposure to danger could be very great." *People v. Rivera, supra*, 14 N. Y. 2d at 446. See also *People v. Peters*, 18 N. Y. 2d 238, 219 N. E. 2d 595, 598 (1966) (although the officer had Peters collared and was armed, "the tables are easily turned").

⁹¹ It is rather interesting to notice that it is common practice for policemen not to search females, even when they arrest them. See McIntyre & Chabreja, *The Intensive Search of a Suspect's Body and Clothing*, 58 J. CRIM. L., CRIM. & POL. SCI. 18 (1967);

peals cannot be faulted for believing that an officer may always "reasonably suspect" he is in danger.⁹² That is the nature of reasonable suspicion.

As for the reasonable suspicion that is a statutory prerequisite to the initial stop, it is fair to say that police officers in New York State have been left to define that concept pretty much as they go along. In the recent *Taggart* decision of the Court of Appeals, an anonymous telephone tip that a described young man on a designated street corner had a gun was held to justify an officer's accosting him, placing him against a wall, and searching his

TIFFANY, MCINTYRE & ROTENBERG, *op. cit. supra*, note 15, at 20. The reasons for this appear to be a combination of chivalry, public relations, and political sensitivity. It may well be that women are less dangerous than men. But it may also be that the police do not lack other means than a weapons search to protect themselves from a suspect or an arrestee with a concealed weapon. One may speculate, at least, as to whether the police are not here subordinating to considerations of political expediency a concern for their safety which this Court, in its cases authorizing warrantless search incident to arrest, thought sufficiently important to require the subordination of important Fourth Amendment values.

It is also interesting that Bristow in his work on field interrogation does not mention a frisk for self protection. To him the search incident to field interrogation is the last step in the process and designed to determine "the subject's possible criminality." BRISTOW, *op. cit. supra*, note 81, at 92. Bristow therefore seems of the view that probable cause is not a prerequisite for this search, although it is desirable.

"While it is true that the primary purpose of the search in a field interrogation is not to secure evidence, but to aid in establishing the subject's character or criminal tendencies, the legal rule of search and seizure should be conformed with whenever possible. The subject of search and seizure is presently receiving widespread interest on the part of the general public, and violations of supposed 'Constitutional Rights,' no matter how groundless, may bring unfavorable publicity."

Id. at 93.

⁹² Bristow indicates that "the patrolman should assume every person he encounters may be armed." *Id.*, at 25.

pockets. In *Sibron*, eight hours' observation of the defendant by a police officer discovered nothing but that he was holding conversations with a number of narcotics addicts; nothing passed hands, and the officer overheard none of the conversations. Reasonable suspicion was found. The procedural history of the case, as we read the record, portrays quite starkly the role of stop and frisk logic in the dialectic of Fourth Amendment evasion. The arresting officer appears at first to have wanted to present the case as an ordinary "dropsie"—one of those wonderfully lucky cases in which the defendant takes occasion to toss away a packet of heroin just as the officer appears on the horizon. (See Complaint, *Sibron* R. 1.) At the hearing, however, his testimony seemed designed to make out a "consent" case (*id.*, 16). When the judge properly found no consent (*id.*, 19), the prosecutor persuaded him that there was probable cause for an arrest and search (*id.*, 19-20). That, of course, would not stand up on the record, and "reasonable suspicion" stepped into the breach at one or another appellate stage. "Reasonable suspicion" being essentially unreviewable because the officer had a hunch which proved right, the *Stop-Frisk Model* amply served to justify the unjustifiable.

We have found only one New York decision in which any court invalidated a stop for want of reasonable suspicion: *People v. Anonymous*, 48 Misc. 2d 713, 265 N. Y. S. 2d 705 (Cty. Ct. 1965), where an officer stopped a boy walking on a summer Sunday, in Hicksville, Long Island, with a carton of books. It is enlightening, we think, to compare that decision with *People v. Reason*, *supra*. In the latter case, reasonable suspicion was found to be made out by an officer's observation that two Negro men got very quickly

into a taxi, on a Harlem street, one carrying a portable phonograph and the other a portable T.V., during daylight hours when the streets were full of people. A few days prior to this date, the officer had attended a community meeting at which residents complained of numerous burglaries in the area, but no complaint was made of burglaries in the building before which the two Negro men were seen to hail a cab, nor in the immediate surroundings, nor did the officer have any information relating to any burglaries accomplished or in progress on that date. Harlem is not Hicksville, however; burglaries *do* occur frequently in Harlem; and there, doubtless lies the difference in the cases. Such again is the nature of reasonable suspicion.

One additional point in the New York experience deserves note. Coincidentally with the enactment of the Stop and Frisk statute in that State, a circular was issued by the New York State Combined Council of Law Enforcement Officials setting guidelines for police performance under the stop and frisk authorization. That circular is appended as Appendix A to this brief. *Inter alia*, it provides that the suspect is to be questioned and frisked "in the immediate area in which he was stopped," *but see People v. Pugach, supra; People v. Hoffman, supra*; that for "purposes of practical enforcement procedures," the language of the statute "abroad in a public place" does not include public portions of private buildings, such as hotel lobbies, etc., *but see People v. Peters, supra*; and that if "the suspect is carrying an object such as a handbag, suitcase, sack, etc., which may conceal a weapon, the officer should not open that item, but should see that it is placed out of reach of the suspect so that its presence will not repre-

sent any immediate danger to the officer," but see *People v. Pugaeh, supra*; *People v. Peters, supra*; *People v. Reason, supra*; and *People v. Cassesse, supra*. Obviously, officers have regularly broken these rules, and the New York courts as regularly have ignored them. The rules—flexible and imprecise as they are—appear to be altogether too confining for a volatile conception of the nature of reasonable suspicion.

We submit that what has happened even on the face of the reported judicial decisions in New York fully confirms our description earlier in this brief of the inevitable consequences of the *Stop-Frisk Model*. "Stops" have been sanctioned that are not distinguishable in the extent of their invasion of privacy from arrests; full-blown searches are conducted in the name of "frisks"; and "reasonable suspicion," incapable alike of explanation and judicial supervision, serves only as a sophistical pretext for the wholesale destruction of Fourth Amendment rights.

We do not think that the New York experience is aberrant in this regard, or that other States and other varieties of stop and frisk might succeed where New York and its section 180-a have totally failed. It is the basic *Stop-Frisk Model*, we believe, that is aberrant. The intrusions which it authorizes against the liberty and privacy of the citizen are intolerable in a free society, unless they are hedged about with effective checks and restraints. Such restraints involve, first, the requirement of particularized justification for the use of the intrusions against particular individuals reliably believed to be criminally connected. They require, second, that the justificatory standard be couched in terms sufficiently objective and communicable that the citizen can ascertain some inkling of the nature of his rights and the

policeman some conception of his powers and their limitations, so that, if those limitations be oppressively transgressed, the policeman and his superiors can be held accountable legally or politically as the case may be. They require, in this last aspect, some fair opportunity for independent review by the judiciary of the policeman's asserted justification for intrusion upon the citizen. The means of providing these several related safeguards in Anglo-American law has always been the probable cause concept; and this Court has noted that it is a "troublesome line" which separates "mere suspicion" from probable cause. *Brinegar v. United States*, 339 U. S. 160, 176 (1949). The innovation of stop and frisk theory which purports to straddle that line with a turbid, amorphous, unsubstantial conception of some state of police-perceived putative guiltiness that is more than suspicion but less than cause—whether the state be called "reasonable suspicion" or some other euphemism—is inherently, irremediably defective.

The defect is exposed, we suggest, at the point where the *Stop-Frisk Model* meets the real world of streets and courts. There is nothing endemically wrong with the *idea* of stop and frisk. Indeed, the mission of stop and frisk theory to establish some third state of police powers, midway between those that can be exercised wholly arbitrarily (such as the power of non-coercive, non-detentive street questioning) and those available only upon probable cause (such as arrest and search), has the allure of sweet reasonableness and compromise. The rub is simply that, in the real world, there is no third state; the reasonableness of theory is paper thin; there can be no compromise. Probable cause is the objective, solid and efficacious method of

reasoning—itself highly approximative and adaptable, but withal tenacious in its insistence that common judgment and detached, autonomous scrutiny fix the limits of police power—which has become, within our system of criminal law administration, the indispensable condition of non-arbitrariness in police conduct. Police power exercised without probable cause is arbitrary. To say that the police may accost citizens at their whim and may detain them upon reasonable suspicion is to say, in reality, that the police may both accost and detain citizens at their whim. But against that dangerous doctrine the Fourth Amendment sets its head. We urge that the Court so hold, unequivocally and forcefully, in these cases.

We so urge although we recognize that, in some ways, the issues before the Court in the *Sibron*, *Peters* and *Terry* cases are framed quite narrowly. The immediate questions are whether, on each record, the respective rights of *Sibron*, *Peters* and *Terry* were violated and, in the New York cases, whether Code of Criminal Procedure, § 180-a is facially unconstitutional, see *Berger v. New York*, *supra*. Those questions naturally invite attention to the factual circumstances of each case—which show, we think, differing degrees of police intrusiveness and differing degrees of ostensible justification for it—and to the detailed body of legal rules (which might be held separately or in combination offensive to the Fourth Amendment) that emerge from the several provisions of the New York statute as construed. In this situation, we earnestly hope that the Court will not choose to treat the questions before it as isolated and independent matters—perhaps, in the process, giving some color of authority to a “balancing” theory of the

Fourth Amendment.⁹³ Apart from *Sibron*, *Peters* and *Terry*, thousands of our citizens daily are being stopped, detained and searched without probable cause. The extent of the intrusion varies from case to case; but all are unconstitutional, we believe, if there is (a) any restraint, or communicated sense of restraint, of the citizen's liberty of movement; or (b) any physical touching, probing, "frisking" or searching of the citizen, (c) without probable cause in its time-honored Fourth Amendment sense. We urge the Court to so declare.

IV.

Stop-and-Frisk, Law Enforcement and the People.

We have as yet said nothing about the various arguments to necessity and/or efficiency of the proponents of stop and frisk. We think that, on any fair appraisal of the state of present knowledge,⁹⁴ those arguments can be dispatched summarily: either as not proved (as the Court viewed similar arguments urged upon it from *Chambers v. Florida*, 309 U. S. 227 (1940), to *Miranda v. Arizona*, 384 U. S. 436 (1966)), or as necessarily subordinated by the Constitution of the United States (as the Court viewed the efficiency arguments made in *Berger v. New York*, *supra*). Particularly where, as here, the argument of police need is advanced to support the allowance of new police powers—powers never heretofore given under the Constitution; indeed, powers that erode *pro tanto* the bedrock principle of probable cause which undergirds the settled constitu-

⁹³ See note 57 *supra* and accompanying text.

⁹⁴ See the literature collected in notes 15, 81 *supra*.

tional doctrine of the Fourth Amendment—we believe that the showing of need required to sustain the argument should be both factually convincing and normatively compelling. The argument of police need for street detention and frisk powers is neither.

Professor Herman Goldstein, a long-time student of the police and police administrator put the matter most succinctly in a recent article:

"It is probably true that a program of preventive patrol does reduce the amount of crime on the street, although there has been no careful effort to measure its effectiveness. It is also apparent, however, that some of the practices included in a preventive patrol program contribute to the antagonism toward the police felt by minority groups whose members are subjected to them. A basic issue, never dealt with explicitly by police, is whether, even from a purely law enforcement point of view, the gain in enforcement outweighs the cost of community alienation."⁹⁵

Others have asked the same or similar questions.⁹⁶

Proponents of stop and frisk are fond of asserting that "aggressive patrol" keeps the crime rate down. We have not seen convincing evidence of this proposition. But even were it established that the *result* of aggressive patrol was

⁹⁵ Goldstein, *Police Policy Formulation: A Proposal for Improving Police Performance*, 65 MICH. L. REV. 1123, 1140 (1967).

⁹⁶ See Traynor, *Lawbreakers, Courts and Law-Abiders*, 31 MO. L. REV. 181, 201 (1966); Norris, *Constitutional Law Enforcement Is Effective Law Enforcement: Toward a Concept of Police in a Democracy and a Citizens' Advisory Board*, 43 U. DET. L. J. 203, 221-224 (1965); Foote, *Law and Police Practice: Safeguards in the Law of Arrest*, 52 NW. U. L. REV. 16, 28.

a decrease in street crime, of course it would not follow that the stop and frisk methods of aggressive patrol were *necessary* to achieve the decrease. Aggressive patrol involves both increased police presence on the streets and increased police intrusion. To say, when a program of aggressive patrol is followed by lower rates of reported crime (if it is) that the increased intrusion, or the combination of increased intrusion and presence is causing the observed effect—rather than that the increased presence alone is causing it—is mere speculation. The South African “blitz” practice described in note 11, *supra*, provides an obvious example. We are told that when a wave of 1000 to 2500 policemen suddenly inundates an area and manhandle all the blacks in sight, the robbery rate falls 50 per cent. That is an impressive figure. But one is led to wonder whether the robbery rate would not be quite as startlingly affected if 1000 to 2500 policemen suddenly appeared on the streets of the same small area, even if they did not stop and search the blacks. Surely, 2500 policemen flooding a neighborhood would have some effect, even if they did nothing but stand on the corners and talk to one another.⁹⁷

However that may be, the point remains, as Professor Goldstein notes, that the evidence of the ill effects of stop and frisk practices, particularly in the ghetto, is as strong at least as any evidence of their good effects “from a purely law enforcement point of view.” We have earlier noted the obvious, unhappy fact that the policeman today is the ob-

⁹⁷ For suggestions of the strong effect of increased police presence alone on crime control, see Foote, *The Fourth Amendment: Obstacle or Necessity in the Law of Arrest*, 51 J. CRIM. L., CRIM. & POL. SCI. 402, 405 (1960); Kennedy, *Crime in the Cities: Improving the Administration of Criminal Justice*, 58 J. CRIM. L., CRIM. & POL. SCI. 142, 143 (1967).

ject of widespread and intense hatred in our inner cities.⁹⁸ The National Crime Commission's Task Force on Police points to stop and frisk practices as one (obviously, only one) of the causes of this phenomenon.

"Misuse of field interrogations . . . is causing serious friction with minority groups in many localities. This is becoming particularly true as more police departments adopt 'aggressive patrol' in which officers are encouraged routinely to stop and question persons on the street who are unknown to them, who are suspicious, or whose purpose for being abroad is not readily evident. The Michigan State survey found that both minority group leaders and persons sympathetic to minority groups throughout the country were almost unanimous in labelling field interrogation as a principal problem in police community relations."⁹⁹

The least implication of these observations is that the police assertion of a need for stop and frisk power may itself reflect the same battle psychology¹⁰⁰ that is responsible for over-frequent use of the power—a psychology that is not always conducive to the best judgment, even on the question of what is good for the police. But the observations have other, more troubling implications which, in candor, we cannot pretermit. We are gravely concerned by the dangers of legitimating stop and frisk, and thus encouraging, and increasing the frequency of occasions for,

⁹⁸ See note 75 *supra*.

⁹⁹ PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE 184 (1967).

¹⁰⁰ See notes 74-77 *supra*. See also SKOLNICK, *op. cit. supra*, note 74, at 87-88, 105.

police-citizen aggressions. Speaking bluntly, we believe that what the ghetto does *not* need is more stop and frisk.

It is no accident that many major riots suffered since 1964 have been sparked by a public confrontation between the police and Negroes. Regardless of the underlying factors which set the stage for riot or increase its likelihood, it is plain that police-community encounters have triggered outbreaks of group hostility:

In Cincinnati a Negro man protesting the death sentence of another Negro is arrested. In Boston, police advance with truncheons on women sitting-in at the welfare department. In Tampa, a cop shoots a Negro burglary suspect in the back after he had refused to halt. Each incident triggered violence. Stores were burned and looted, people injured. Rioting ended in Boston not because the police had dispersed crowds, but because the cops went away.¹⁰¹

Or as the *New York Times* put it:

"Even before Newark the script was familiar. Some minor incident begins it all, often the arrest of a Negro by a policeman."¹⁰²

We do not suggest, we emphasize lest we be misunderstood, that police conduct in any way "causes" riot or is responsible for it. Would it were so; the wrong could then be more readily righted. We will not repeat the "appall-

¹⁰¹ "Summer Riots" *New Republic*, June 24, 1967, p. 7. See also Hayden, *The Occupation of Newark*, 9 *New York Review of Books*, No. 3, Aug. 24, 1967, p. 14.

¹⁰² Edit., *New York Times* July 16, 1967.

ingly familiar, statistical litany"¹⁰³ of social ills which are responsible. We only observe that the frustration and bitterness of poverty, unemployment, slum housing, ignorance and segregation easily fix on the police; that in return, and often for quite good reasons, the police view the Negro with fear; and—how apt the word here—suspicion. The bloody turmoils which we have experienced are ignited and intensified by this mutual hostility.

The gap between Negroes and the police is enormous. A study by the National Crime Commission shows that "non-whites, particularly Negroes, are significantly more negative than whites in evaluating police effectiveness in law enforcement."¹⁰⁴ Negroes and whites have widely different perceptions of police discourtesy, misconduct and honesty and the need for police protection.¹⁰⁵ The Commission's study supports the conclusions of the Director of the Lemberg Center for the Study of Violence, in a letter to counsel, that the police and Negro youth have perceptions of each other which escalate the conflict between them.¹⁰⁶

You have asked whether the Lemberg Center for the Study of Violence is in a position to make a statement on police-community relations as they affect behavior within the Negro ghetto. We have done a

¹⁰³ Rustin, *Black Power and Coalition Politics* 42 Commentary 37 (Sept. 1966).

¹⁰⁴ PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE 146 (1967).

¹⁰⁵ PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE 146-149 (1967).

¹⁰⁶ The original of Dr. Spiegel's letter of July 14, 1967 has been deposited with the clerk.

great deal of face-to-face interviewing with Negroes in the ghettos of six different cities and have accumulated observations on some of the psychological aspects of interactions between Negro youth and young adults on the one hand and white police officers on the other.

According to our observation, police attitudes toward working class Negro youths and young adults are often based on the concept of the Negro as a savage, or animal, or some being outside of the human species. Therefore, the police expect behavior from Negroes in accordance with this concept. The young Negroes in cities have complementary attitudes toward police officers. The police are perceived as animal-like, brutal, and sadistic—again, outside the human species.

Because of the police officers conception of the Negro male, he frequently feels that most Negroes are dangerous and need to be dealt with as an enemy even in the absence of visible criminal behavior. Since he feels that he is dealing with an unreliable and powerful enemy, he has to deal with the threat in drastic ways, namely by suddenly and ruthlessly stripping and disarming any Negro who has aroused his suspicion. Because of the Negro's concept of the police, the young Negro male feels that he has only two alternatives open to him—intense resistance or abject surrender.

These complementary attitudes result in a vicious circle of behavior which serves to confirm the image which Negro males and police officers hold of each other. In addition, police practices meant to overpower or cow the suspect before evidence of his of-

fense is obtained have mainly a provocative effect. Such provocation is especially unfortunate in that it tends to produce an impression in the suspect that the police are not only as brutal as assumed, but are also frightened. In the mind of the Negro male, the police officer is over-reacting to the potential offense involved in the usual situation and this over-reaction is probably the result of fear as well as sadism. If the policeman is perceived as either frightened or brutal, the Negro male develops an attitude of contempt for the policeman as for his authority.

It is clear to me that it will be difficult to correct this complex process of interaction. As a start, better guidelines are needed for police behavior in respect to young Negro males. Specifically, it would be helpful if the police were trained to make more careful discriminations, wherever possible, with respect to potential Negro offenders. They should begin by interrogating any suspect as if he were a human being and as if he could be trusted to give responsible answers to the police officer in his mandatory role of investigating possible criminal behavior. It is often said that the police should be asked to show more "respect" for ghetto dwellers. I think this expression oversimplifies the situation as it is difficult to show respect to someone not considered to be a human being. My idea is that police officers should have more familiarity with the psychology of Negro youths so that they could make a more differentiated and appreciated response to their behavior. This would enable the police officer more readily and reliably to distinguish those Negro youths who are actually dangerous from those

who would cooperate with police officers if they were treated as responsible human beings.

I realize that these statements are only a beginning and that much more work in this area needs to be done. However, I hope that you will find what I have to say helpful in your own work.

John P. Spiegel, M.D.
Director

The Center's study of recent riots describes how police conduct may function, if perceived as unjust, to ignite violence:

" . . . riots tend to break out as a result of the interaction of two factors—the 'grievance level' of people in the ghetto and the inflammatory nature of the event which precipitates the initial disturbance. These two factors are in a reciprocal relation with each other: the higher the grievance level, the slighter the event required to trigger the riot. Low levels of Negro discontent require an event which is highly inflammatory in order that a riot break out. An 'inflammatory event' is usually an incident which is initiated by white people and which is perceived by black people in the ghetto as an act of injustice or as an insult to their community. The greater the injustice is perceived to be, the more 'inflammatory' is the effect of the incident.¹⁰⁷

¹⁰⁷ Six Cities Study—a Survey of Racial Attitudes in Six Northern Cities: Preliminary Findings, A Report of the Lemberg Center for the Study of Violence, Brandeis University, June 1967.

There is, therefore, growing dissatisfaction on the part of many Negroes, especially the young, which focuses on the police as the most visible and provocative members of the white community. At the same time, police conduct and capacity is viewed in a dramatically distinct manner by Negroes, the police and other residents of the community.

In such a context, the need for "better guidelines . . . for police behavior", as Dr. Spiegel writes, is obvious. The National Crime Commission Task Force on Police felt compelled to repeat again and again the conclusion we have previously noted: that "field interrogations are a major source of friction between the police and minority groups"¹⁰⁸ and that "misuse of field interrogations" causes "serious friction with minority groups in many localities."¹⁰⁹ Arbitrary police conduct epitomizes, and sets off a response to, many grievances.¹¹⁰

¹⁰⁸ PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE 183 (1967).

¹⁰⁹ *Id.*, at 184. Although the Crime Commission believes that there is a need to authorize the police to stop suspects and possible witnesses of major crimes to detain them for brief questioning and to search for dangerous weapons, the Commission recommends such authority be hedged about with restrictions which the New York and Ohio practices under scrutiny do not contain. *Id.* at 185. In addition, the Commission concluded that "arrests for investigation or on suspicion, whatever label is attached, should be abolished by all departments that now utilize them. This practice has long been a source of justified community hostility." The Commission reached this conclusion after surveying arrest statistics which showed that arresting persons as a means of detaining them while an investigation of their possible involvement in the crime is conducted has been a common practice. But as we have shown, there is no real distinction between arrest on suspicion and detention and search for suspicion.

¹¹⁰ See *id.*, at 185:

"The study concluded that the juveniles understood being sought and interrogated for their illegal activity:

To legitimate detention and search on "reasonable suspicion"—without probable cause—therefore is to give free reign to police intervention in the most dangerous way (without objective standards) in the most dangerous place (the ghetto street). If the police and the ghetto dweller view each other with fear, suspicion, often hatred, any enforced stop is a potential source of conflict. But when the stop is based on the inarticulate, unregulated judgment of the cop on the beat, the potential is magnified.

We do not suppose that such considerations as these can or should determine the Fourth Amendment question. We have rested our constitutional submission not on them, but on the firm grounds of history, authority and (we respectfully submit) reason, set out in Parts I-III of this Brief. However, we anticipate that the States of New York and Ohio will make the familiar inflated claims for stop and frisk as tools of law and order. If they do, let there be no mistake about this call to practicality. Whatever its conveniences and benefits to a narrow view of law-enforcement, stop and frisk carries with it an intense danger of inciting destructive community conflict. To arm the police with an inherently vague and standardless power to detain and search, especially where that power cannot effectively be

'If you done something and you be lying and yelling when the boys from juvy come around and they catch you lying, well, what you gonna do? You gonna complain 'cause you was caught? Hell man, you can't do that. You did something and you was caught and that's the way it goes.

But they were indignant about field interrogation for offenses they did not commit—when "we were just minding our own business when the cops came along." And they particularly resented being singled out because of their clothes or hair: "Hell man, them cops is supposed to be out catching criminals! They ain't paid to be lookin' after my hair!" The juveniles consider this harassment by the police as a policy of confinement by a "foreign army of occupation."

regulated, contributes to the belief which many Negroes undeniably have that police suspicion is mainly suspicion of them, and police oppression their main lot in life. Arbitrary police interrogation, street detention, and frisk are nothing less than a major part of that social and psychological constellation which in them produces "untoward counter reactions of violence." *Lankford v. Gelston*, 364 F. 2d 197, 204, n. 7 (4th Cir. 1966).

CONCLUSION

The Court should hold that neither stops nor frisks may be made without probable cause. In each of these cases, the judgment of conviction should be reversed.

Respectfully submitted,

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APPENDIX**Circular of the New York State Combined Council
of Law Enforcement Officials**

Circular No. 25.

**INSTRUCTIONS TO MEMBERS OF THE FORCE CONCERNING
THE "STOP AND FRISK" (CHAPTER 86) AND
"NO KNOCK" (CHAPTER 85) LAWS**

Two new statutes, with major impact on police authority, become effective in New York State on July 1, 1964.

These laws, if properly utilized, can be of considerable aid in safeguarding our communities. Their passage resulted in part from the combined strenuous efforts expended by New York State's various law enforcement agencies. As in the case with all other law enforcement powers, whether or not these sorely-needed enactments will withstand the attacks that will be made upon their constitutionality, and will stand as laws upon the books of this State, will depend in large measure upon the fashion in which they are carried out. They should be enforced with full recognition that their purposes are to protect the community, while simultaneously protecting and treating fairly all persons in it.

Every member of the force has the responsibility of seeing to it that the powers conferred by these new statutes are used to further those purposes for which they were enacted. Some guidelines for proper conduct pursuant to these statutes are set forth herein:

I THE "STOP-AND-FRISK" LAW (Chapter 86, Laws of 1964)

The new statute, which becomes § 180-a of the Code of Criminal Procedure, provides as follows:

§ 180-a. Temporary questioning of persons in public places; search for weapons.

1. A police officer may stop any person abroad in a public place whom he reasonably suspects is committing, has committed or is about to commit a felony or any of the crimes specified in section five hundred fifty-two of this chapter, and may demand of him his name, address and an explanation of his actions.

2. When a police officer has stopped a person for questioning pursuant to this section and reasonably suspects that he is in danger of life or limb, he may search such person for a dangerous weapon. If the police officer finds such a weapon or any other thing the possession of which may constitute a crime, he may take and keep it until the completion of the questioning, at which time he shall either return it, if lawfully possessed, or arrest such person.

A. GENERAL PRINCIPLES:

1. The new law does not permit an officer to stop just any passer-by and search him, nor does it allow the search of any person merely because he has a criminal record.

2. The new law does not permit the stopping and searching of any person found in the vicinity of a crime scene, merely because he happens to be there.

3. The new law does not dispense with the need for adequate observation and investigation, depending upon all the circumstances, before a stop is made.

4. No officer should stop anyone, under the new law, unless he is prepared to explain, with particularity, his reasons for stopping such person.

5. No officer should stop anyone, under the new law, unless the crime he reasonably suspects is a felony or one of those misdemeanors listed in § 552 of the Code of Criminal Procedure.

6. When a person is stopped under the new law, the officer—if not in uniform—must properly and promptly identify himself to the person stopped.

7. Not everyone stopped may be searched; searches are only permitted when the officer reasonably suspects that he is in danger.

8. The right to stop provided in the new law in no way changes the previously existing authority of an officer to make an arrest without an arrest warrant, as provided by § 177 of the Code of Criminal Procedure. The new rights to stop and to search, as defined in the new statute, are separate and distinct from the established right to arrest, as provided by existing law, and to make a complete search incident to such arrest.

9. Whether or not an arrest follows a stopping under the new law, whenever any force is used in stopping the suspect, or whenever any frisk or search is made, a written report shall be made to the officer's superior officer. Form for such reports, together with instruc-

tions for their use, will be distributed with separate orders.

B. THE RIGHT TO "STOP."

1. "stop":

The new statute gives the officer the right to stop a person under the indicated circumstances. If the suspect refuses to stop, the officer may use reasonable force, but only by use of his body, arms and legs. He may not make use of a weapon or nightstick in any fashion. (Of course, if there is an assault on the officer or other circumstances sufficient to justify an arrest, the officer may use necessary force to effect that arrest.)

2. "abroad in a public place":

- a. For the purposes of practical enforcement procedures, this phrase is viewed as being restricted to public highways and streets, beaches and parks (to include outdoor facilities open to the public even though privately owned), depots, stations, and public transportation facilities.
- b. For the purpose of practical enforcement procedures, this phrase is viewed as not including the public portions of private buildings such as hotel lobbies, moving picture theatres, licensed premises, etc.
- c. Definitions of the words "public place" as found in other laws, such as those dealing with disorderly conduct, are not to be substituted for the strict definition of "abroad in a public place" as outlined above.

3. "whom he reasonably suspects":

a. The words "reasonably suspects" are not to be lightly regarded; they are not, just an incidental phrase; they have real meaning. "Reasonable suspicion" is clearly more than "mere suspicion." At the same time it is something less than "reasonable ground for believing" that a crime is being committed, as is necessary for an arrest.

b. No precise definition of "reasonably suspects" can be provided, other than that it is such a combination of factors as would merit the sound and objective suspicions of a properly alert law enforcement officer, performing his sworn duties. Among the factors to be considered in determining whether or not there is "reasonable suspicion" are:

- i. The demeanor of the suspect.
- ii. The gait and manner of the suspect.
- iii. Any knowledge the officer may have of the suspect's background or character.
- iv. Whether the suspect is carrying anything, and what he is carrying.
- v. The manner in which the suspect is dressed, including bulges in clothing—when considered in light of all of the other factors.
- vi. The time of the day or night the suspect is observed.
- vii. Any overheard conversation of the suspect.
- viii. The particular streets and areas involved.

- ix. Any information received from third persons, whether they are known or unknown.
- x. Whether the suspect is consorting with others whose conduct is "reasonably suspect."
- xi. The suspect's proximity to known criminal conduct.

(This listing is not meant to be all inclusive.)

- c. "Reasonable suspicion" of any crime at all does not afford a basis for stopping under the new law; there must be reasonable suspicion that the suspect is committing, has committed, or is about to commit either any felony or one of those misdemeanors enumerated in § 552 of the Code of Criminal Procedure. (These misdemeanors are weapons crimes, burglar's tools, receiving stolen property, unlawful entry, escape, impairing, carnal abuse, indecent exposure, obscenity and other indecency provisions, sodomy, rape, narcotics, amphetamines and hypodermic needles.) Suspicion of disorderly conduct, an offense, is not for the purpose of practical enforcement procedures a basis for stopping.

C. THE RIGHT TO "QUESTION".

- 1. No questions are to be asked until the officer has, either by being in uniform or by showing his shield and stating he is a police officer, identified himself.
- 2. Promptly thereafter, the suspect should be questioned (and frisked, when appropriate) in the immediate area in which he was stopped.

3. Should the suspect refuse to answer the officer's questions, the officer cannot compel an answer and should not attempt to do so. The suspect's refusal to answer shall not be considered as an element by the officer in determining whether or not there is a basis for an arrest.

4. In ascertaining "his name" from the suspect, the officer may request to see verification of his identity, but a person shall not be compelled to produce such verification.

5. If the suspect does answer, and his answers appear to be false or unsatisfactory, the officer may question further. Answers of this nature may serve as an element in determining whether a basis for arrest exists. (But if an officer determines that an answer is "unsatisfactory" and relies upon this in part to sustain his arrest, he should be able to explain with particularity the manner in which it is "unsatisfactory.")

6. If, after he has been stopped and the officer has identified himself, the suspect attempts to flee from the officer, this fact may be an element in determining whether a basis for arrest exists. However, the officer should not resort to the use of a weapon or other extraordinary means to stop the flight unless he has information which now leads him to reasonably believe that the suspect has committed a felony.

D. THE RIGHT TO "SEARCH."

1. Clearly no right to search exists unless there is a right to stop.

2. Nor is a search lawful in every case in which a right to stop exists. A search is only justified under the new law when the officer reasonably suspects that he is in danger. This claim is not to be used as a pretext for obtaining evidence. In instances in which evidence is produced as a result of a search, the superior officers, the prosecutors, and—it is anticipated—the courts, will scrutinize particularly closely all the circumstances relied upon for justifying the stopping and searching.

3. No search is appropriate unless the officer “reasonably suspects that he is in danger.” Among the factors that may be considered in determining whether to search are:

- a. Nature of the suspected crime, and whether it involved the use of a weapon or violence.
- b. The presence or absence of assistance to the officer, and the number of suspects being stopped.
- c. The time of the day or night.
- d. Prior knowledge of the suspects’ record and reputation.
- e. The sex of the suspect.
- f. The demeanor and seeming agility of the suspect; and whether his clothes so bulge as to be indicative of concealed weapons.

(This listing is not meant to be all inclusive.)

4. Initially, once the determination has been made that the officer may be in danger, all that is necessary is a frisk—an external feeling of clothing—such as would reveal a weapon of immediate danger to the officer.

5. A search of the suspect's clothing and pockets should not be made unless something is felt by this frisk—such as a hard object that feels as if it may be a weapon. In such event, the officer may search that portion of the suspect's clothing to uncover the article that was felt.
6. If the suspect is carrying an object such as a handbag, suitcase, sack, etc. which may conceal a weapon, the officer should not open that item, but should see that it is placed out of reach of the suspect so that its presence will not represent any immediate danger to the officer.

E. AN EXAMPLE:

An example may help to illustrate. Assume that a mugging has just occurred. The officer questions the victim. She says that her pocketbook was taken and she gives a description of the suspect stating, among other things, that he is about six feet tall and was wearing a brown leather windbreaker. While the victim is receiving medical treatment, the officer starts a search of the area. He sees a man hurrying down a dark street. The man's hand is clutching at a bulge under his brown windbreaker, and he glances back at the officer repeatedly. The suspect meets the description of the perpetrator except for one discrepancy: he is only five feet tall.

The officer does not have reasonable grounds to arrest the suspect for his description is clearly inconsistent with the victim's estimate of the perpetrator's height. However, from the officer's experience he realizes that victims of crime, in an excited condition, often give descriptions which are not correct in every detail. Although he lacks reason-

able grounds to make an arrest, from all of the circumstances the officer "reasonably suspects" that the man he has spotted has committed the crime. Under the new law, the officer may stop this person, and may ask for his identification and an explanation of his actions. And because the crime involved violence and the suspect's windbreaker seems to conceal unnatural bulges, a frisk may be in order.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 67

JOHN W. TERRY and RICHARD D. CHILTON, *Petitioners,*

—v.—

STATE OF OHIO, *Respondent.*

No. 74

JOHN FRANCIS PETERS, *Appellant,*

—v.—

STATE OF NEW YORK, *Appellee.*

No. 63

NELSON SIBRON, *Appellant,*

—v.—

STATE OF NEW YORK, *Appellee.*

**BRIEF OF AMERICAN CIVIL LIBERTIES UNION,
AMERICAN CIVIL LIBERTIES UNION OF OHIO, AND
NEW YORK CIVIL LIBERTIES UNION, AMICI CURIAE**

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1967

No. 67

JOHN W. TERRY and RICHARD D. CHILTON,

Petitioners,

—v.—

STATE OF OHIO,

Respondent.

No. 74

JOHN FRANCIS PETERS,

Appellant,

—v.—

STATE OF NEW YORK,

Appellee.

No. 63

NELSON SIBRON,

Appellant,

—v.—

STATE OF NEW YORK,

Appellee.

**BRIEF OF AMERICAN CIVIL LIBERTIES UNION,
AMERICAN CIVIL LIBERTIES UNION OF OHIO, AND
NEW YORK CIVIL LIBERTIES UNION, AMICI CURIAE**

Interest of *Amicus*

The American Civil Liberties Union, of which the American Civil Liberties Union of Ohio and the New York Civil Liberties Union are affiliates, is a national organization of persons dedicated to the preservation of a free and open society, principally through the protections embodied in our Bill of Rights and the Fourteenth Amendment to the United States Constitution.

The formulation of standards of criminal due process consistent with the imperatives of individual liberty in an ordered society has long been a vital function of this Court. The entire spectrum of the rights of the accused has demanded, and quite properly received, its ever-increasing attention. Nowhere, however, is the relationship between the accused and prosecutorial government more critical than at the very inception of the criminal process—at the point of arrest and accompanying search—an area traditionally safeguarded by the protections of the Fourth Amendment.

The instant cases involve the application of the Fourth Amendment to on-the-street detention and interrogation, (known in street vernacular as “stop and frisk.”)¹ In the opinion of the President’s Commission on Law Enforce-

¹ The use by *amici* of the term “stop and frisk” throughout this brief is occasioned by its brevity. Wherever generally used, and as used here, the phrase has come to mean on-the-street detention for purposes of police interrogation, accompanied by a search of the person of the suspect, ostensibly for the purpose of protecting the safety of the police officer. In the absence of probable cause, the subsequent use of incriminating evidence so obtained to convict the suspect of a crime, demonstrates that, under some circumstances, a policeman’s suspicion, like virtue, is its own reward.

ment, "No matter is more important to police-community relations than the manner in which police officers talk to people on the street."² The failure, in the name of police efficiency, to compel constitutional conduct in this sphere is, in the long view, inefficient as well as unconstitutional—it serves only to discredit the entire system of law enforcement in the eyes of the community which it serves and upon which it must ultimately depend to combat crime.

It is in the hope that in some measure *amici* may be of assistance to the Court in performing its delicate task in the instant case of weighing "the social need that crime shall be repressed"³ against "the social need that the law will not be flouted by the insolence of office"⁴ that this brief is filed.

The written consent of the parties to this appearance by *amici* has been obtained and filed with the Clerk of the Court.

Statement of the Case

Terry and Chilton

On October 31, 1963, at about 2:30 p.m., in broad daylight, petitioners were seen on a busy street in the business district in downtown Cleveland, Ohio (R. 12, 116). A plainclothes police officer (R. 122), assigned to stores and pickpockets in the downtown area (R. 106), observed their behavior for a period of about ten minutes (R. 13) from a

² Task Force Report: The Police 180 (1967).

³ Cardozo, J. in *People v. Defore*, 242 N. Y. 13, 24, 150 N. E. 585, 589 (1926).

⁴ *Ibid.*

vantage point across the street approximately 300 to 400 feet away (R. 12). He noted that petitioners, both Negroes, were walking back and forth on the sidewalk in front of a row of stores, peering in the windows of one of several stores (R. 23, 119) and returning to the corner, when they engaged in conversation with each other, and ultimately with a third man, a white man, who joined them later (R. 13, 22). Although he had no previous information about them (R. 119), did not know them (R. 119), and admitted that there was nothing unusual about their dress or appearance (R. 120) or their gait (R. 15, 121), he "suspected they were waiting for an opportunity to pull a stick-up" (R. 138) despite the fact that he had never arrested anyone before for a prospective "stick-up" (R. 160) nor had he ever in his entire thirty-five years of experience as a detective observed anyone "casing a place" for prospective misconduct (R. 46).

He subsequently testified that he "didn't like them (R. 118) or "their actions" (R. 42), that he "was just attracted to them and * * * surmised that there was something going on" (R. 47), and that he did not know whether if he saw them engaged in the identical conduct again he would have had any cause for suspicion (R. 47).

In any event, when the police officer saw the three men conversing, he ran across the street (R. 121) and in the ordinary pedestrian traffic of a busy street in a commercial district during business hours (R. 124), accosted petitioners and the other man (R. 16). He said he was a police officer but did not show his badge (R. 122), or identify himself further (R. 123). He asked the men their names (R. 16, 123), and they responded with alacrity (R. 16). Whereupon the police officer grasped petitioner Terry, turned

him around and patted the outside of his topcoat, felt the outlines of a weapon, reached into the upper left hand inside pocket of his topcoat, felt the handle of a gun, and, when he could not pull the gun out of the pocket easily, pulled the topcoat off petitioner and seized the weapon (R. 16, 124). The police officer then ordered the three men into a nearby store (R. 13, 125), shouted to the storekeeper to "call the wagon" (R. 125)—at which point the police officer conceded all three men were under arrest, Terry for carrying a concealed weapon (R. 33), the other two for "association with him" (R. 131). While they had their hands raised above their heads, the police officer proceeded to search petitioner Chilton and the other man (R. 17), and discovered and seized a gun in the outer left hand pocket of Chilton's coat (R. 17, 19). Search of the other man revealed no weapons (R. 17). All three men were transported to the police station (R. 134). Petitioners were charged initially with "investigation" and then with carrying concealed weapons in violation of Section 2923.01 Ohio Revised Code (R. 129).

The trial judge, after expressly rejecting the contention of the prosecution that the seizure of the weapons was pursuant to a lawful arrest (R. 100), overruled defense motions to suppress on the ground that "the guns [were] the fruit of the frisk, and not of a search" (R. 98).

Peters

On July 10, 1964 at about 1:00 p.m., Samuel Lasky, a New York City Policeman, at the time off-duty, heard a noise at the door of his apartment in Mount Vernon. He looked through the peephole of the door and saw appellant Peters and another man "tiptoeing" down the hallway (R.

15). Although Lasky's apartment building houses approximately 120 tenants (R. 14), when Lasky didn't recognize the men he called police headquarters to report the incident (R. 15). He then returned to the peephole and saw the two men still tiptoeing down the hall toward a stairway (R. 15). With his service gun in hand he ran down the hallway and down the stairs after the two men. Lasky apprehended Peters as the latter was "walking in a rapid way" down the stairway away from him (R. 15, 19).

Seizing Peters by the shirt collar (R. 16, 20), Lasky questioned him at gunpoint (R. 18) as to what he was doing in the building. There is no testimony in the record which would indicate that Lasky was in any danger of any kind as he held Peters at gun point. Peters said that he was looking for a girl friend. When asked for her name, he stated that she was a married woman and declined to name her (R. 21). Lasky then "frisked" Peters (R. 21), felt a hard object in Peters' right pants pocket, and took out an opaque plastic envelope (R. 17, 18). In the envelope, Lasky found "6 picks and 2 Allen wrenches with the short leg filed down to a screwdriver edge, and a tension bar" (R. 17).

Peters was then arrested by City of Mount Vernon Police who arrived in response to Lasky's earlier telephone call. After indictment for illegal possession of burglar's tools, defendant's motion for the suppression of the evidence seized by Lasky during the "frisk" was denied (R. 3-4).

Sibron

On March 9, 1965, Patrolman Anthony Martin of the New York Police apprehended Sibron in a restaurant in Brooklyn. Officer Martin, in uniform, ordered Sibron to

step outside. As Sibron left the restaurant, the officer stated, "You know what I am after" (R. 16). Sibron and the officer then, more or less simultaneously, reached into Sibron's jacket pocket where the officer grabbed several packets of narcotics (R. 16-17). The officer did not have a search warrant (R. 9-10).

Officer Martin testified that on March 9th, over a period of eight hours, he had observed Sibron in conversation with six or eight persons who he knew to be drug addicts (R. 13-15). When Sibron went into the restaurant, Officer Martin saw him speaking with three other known addicts (R. 15). He did not know what any of the conversations were about (R. 18). He then called Sibron from the restaurant, questioned and searched him, and discovered the packets of heroin (R. 16-17).

A motion to suppress the evidence was denied (R. 20).

In the view of *amici*, although some factual distinctions among these cases might be made, they are distinctions without a constitutional difference and all are entitled to reversal for the same legal reasons. Accordingly, *amici* have consolidated their legal arguments for reversal of all three cases in the balance of this brief.

Argument

The instant cases present for review examples of a growing trend of state court decisions⁵ and statutes⁶ authorizing police to stop, question, and "frisk" or search "suspicious persons" without probable cause to believe that the suspect

⁵ *California*: People v. Garrett, 238 Cal. App. 2d 292; 47 Cal. Rptr. 731 (3d Dist. Ct. App. 1965); People v. Michelson, 59 Cal. 2d 448, 450-51 (1963); *Massachusetts*: Commonwealth v. Ballou, 217 N. E. 2d 187 (1966); *New York*: People v. Pugach, 15 N. Y. 2d 65, 204 N. E. 2d 176, cert. den. 380 U. S. 936 (1965); People v. Rivera, 14 N. Y. 2d 441, 201 N. E. 2d 32, cert. denied 379 U. S. 978 (1964); *New Jersey*: State v. Dilley, 49 N. J. 460 (1967); *Pennsylvania*: Commonwealth v. Hicks, 223 A. 2d 873 (Pa. Super. Ct. 1966). But see United States v. Margeson, 259 F. Supp. 256 (E. D. Pa. 1966) and cases cited at footnote 22 *infra*.

⁶ N. Y. Code Crim. Proc. § 180-a, which is raised for review in Nos. 63 and 74. A "Stop and Search" bill was introduced in the Ohio legislature early in the 1967 session and defeated after a vigorous floor debate. See Cleveland Plain Dealer, Feb. 23, 1967, p. 4 col. 3. A similar fate was met by recently proposed statutes in Illinois (H. B. 1078) and Michigan (S. B. 747). See, *Frisking in the Absence of Sufficient Grounds for Arrest as a Common Police Practice Today*, 1965 U. ILL. L. F. 119, 127; see also, AMERICAN LAW INSTITUTE, MODEL CODE OF PREARRAIGNMENT PROCEDURE § 2.02 (Tent. Draft No. 1, 1966); A REPORT BY THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY (U. S. Govt. Printing Office, Feb. 1967).

Section 180-a of the N. Y. Code of Criminal Procedure is modeled upon the Uniform Arrest Act promulgated more than twenty years ago by the Interstate Commission on Crime. See Warner, "The Uniform Arrest Act", 28 U. VA. L. REV. 315 (1942). Statutes modeled on the Uniform Arrest Act have been enacted in New Hampshire, Rhode Island, and Delaware. N. H. Laws, §§ 594:2-3 (1955); R. I. Gen. Laws Ann. § 12-7-1 (1965); Del. Code Ann. Tit. 11, § 1902 (1953). Similar legislation has also been enacted in Hawaii, Massachusetts and the City of Miami, Florida. Rev. Laws of Hawaii, Tit. 30, ch. 255, §§ 4-5 (1955); Mass. Gen. Laws ch. 41, § 98 (1961); Code of City of Miami, Florida, § 43-46 (1957), as amended by Ord. No. 7,367 (1965).

has committed a crime. Unless this Court acts, this trend will effectively emasculate the shield of probable cause which the Fourth Amendment has heretofore interposed between the legitimate investigative function of the police and the right of the individual to be let alone.

It cannot be doubted that for many years, state police officers have been stopping and frisking suspects, without their consent, without a search warrant or probable cause, and using the yield of such searches to convict them of crimes. The constitutionality of such police practice has been in doubt at least since *Wolf v. Colorado*, 338 U. S. 25 (1949), which applied the core of the Fourth Amendment to the states through the Due Process Clause of the Fourteenth. The evidence so seized has been constitutionally inadmissible in state criminal cases since *Mapp v. Ohio*, 367 U. S. 643 (1961) as a result of the elevation of the federal exclusionary rule of *Weeks v. United States*, 232 U. S. 383 (1914), to a constitutional command. And when *Beck v. Ohio*, 379 U. S. 89 (1964) made it clear that federal standards of arrest, including the constitutional condition precedent of probable cause, set the minimal requirements of valid state arrest as well, the constitutional threat to continued state police "stop and frisk" activity was evident.

The decisions and statutes which have upheld the validity of "stops and frisks" have reasoned (i) that a "stop"—a compulsory detention by the police for purposes of interrogation—is not an arrest requiring probable cause for its validity, but a species of sub-arrest or non-arrest to which none of the constitutional requirements of arrest apply and which may lawfully be effected on "suspicion" or "reason-

able suspicion" of past or even future crimes, and (ii) that a "frisk"—which the courts have frequently defined as "the patting of the exterior of one's clothing in order to detect by touch the presence of a concealed weapon"—is a "lesser degree" invasion of privacy than a "full-blown search of the person" and is accordingly "reasonable" within the meaning of the Fourth Amendment when effected incident to a "stop" and when the policeman "suspects" (although without probable cause) that the frisk is necessary for his self protection. In No. 67, the lower court added the further novel observation that even if the frisk was unconstitutional, the *raison d'être* of the exclusionary rule of *Mapp v. Ohio*, 367 U. S. 643 (1961) does not require the product of the frisk to be barred from evidence since "a judicial rule rendering evidence produced as the result of a 'frisk' inadmissible would fail to deter the police from 'frisking' suspects believed to be armed, as police 'frisk' for their own protection rather than for the purpose of looking for evidence."²

Tenuous as the foregoing reasoning is, the lower courts have in practice applied the "stop and frisk" doctrine so as to reduce their own stated requirement of "reasonable suspicion" to mere "intuition,"³ and to validate arrests which are more than mere temporary detentions, and general searches which are more than mere "frisks" and which have no relation whatever to the self-protection needs of the police officer.

¹ *People v. Peters*, 18 N. Y. 2d 238, 245 (1966); *People v. Rivera*, 14 N. Y. 2d 441, 446 (1964); *State v. Terry*, 214 N. E. 2d at 120. But see *People v. Taggart*, — N. Y. 2d — (July 7, 1967).

² 214 N. E. 2d 121.

Thus, in No. 74, the New York Court of Appeals defined the "reasonable suspicion" required for stop and frisk under Section 180-a of the N. Y. Code of Criminal Procedure in the broadest possible terms as constituting the mere *intuition* of the experienced police officer:

"By requiring the reasonable suspicion of a police officer, the statute incorporates *the experienced police officer's intuitive knowledge and appraisal* of criminal activity. *His* evaluation of the various factors involved insures a protective, as well as definitive, standard" 18 N. Y. 2d at 245. (Emphasis added.)

Judge Van Voorhis accurately defined the scope of §180-a and the New York case law in his dissent in No. 63 below, as follows:

"The power to frisk is practically unlimited, inasmuch as whether an officer 'reasonably suspects' that someone is committing, has committed or is about to commit a felony necessarily depends to a large extent upon the subjective operations of the mind of the officer" 18 N. Y. 2d 605.*

In No. 74, the lower court upheld the forcible apprehension of appellant Peters at gunpoint as a mere "frisk" since no formal arrest was made. Yet the Supreme Court of New Jersey has since held that a "stop", not an arrest, occurred even where the officer formally advised the accused that he was under arrest. The Court observed:

* Indeed, the lower courts in No. 67 and No. 74 implied that a person is protected from detention and search under the "stop and frisk" doctrine only where his activities are "perfectly normal". See *People v. Peters*, 18 N. Y. 2d at 246 and 254 N. Y. Supp. 2d at 13; *State v. Terry*, 214 N. E. 2d at 118.

"... it seems evident to us that the legality of incidental street detention for purposes of summary inquiry should not be permitted to turn on whether it is formally labelled as an arrest but rather on whether it was reasonable in the light of the circumstances." *State v. Dilley*, 49 N. J. 460, 467-68 (1967).

Moreover, "frisks" have not been limited to "the patting of the exterior of one's clothing". In No. 74, the frisk of appellant was completed when he felt a hard object in appellant's pocket and withdrew an opaque envelope from the pocket. The officer went further, however, and searched the envelope. Similarly, in No. 63, the New York Court of Appeals held valid a so-called frisk where "the officer put his hand into the suspect's pocket" (18 N. Y. 2d 604). In *People v. Taggart*, — N. Y. 2d — (July 7, 1967), the New York Court of Appeals explicitly acknowledged that the so-called "frisks" in these cases were "searches" and explicitly held that §180-a of the New York Code of Criminal Procedure authorized searches of the person without probable cause.

Finally, although the stop and frisk doctrine has been rationalized on the basis of the self-defense needs of the police officer, lower courts have not limited the doctrine to circumstances where a frisk is genuinely necessary for the protection of the policeman. In No. 74 there is not one shred of evidence that the officer reasonably—or even unreasonably—believed he was in any danger as he held appellant Peters by the collar, at gun point, and questioned him. Moreover, any danger that may have existed in that situation was removed at the moment when the officer removed the opaque envelope from appellant's pocket. There

existed no further possible danger to justify the officer's opening the envelope and examining its contents.¹⁰ There is a similar complete lack of evidence of danger to the officers in Nos. 67 and 63. As Judge Van Voorhis noted in his dissent in No. 63 below, the authorization to search granted to the police in New York has been defined so broadly that "the safety of the officer or public from violence is not remotely involved". 18 N. Y. 2d 607.

Amici urge that (I) the detentions and interrogations in the three cases at bar were arrests or "seizures of persons" within the purview of the Fourth Amendment, as applied to the states through the Fourteenth, and that they were invalid by operation of that same constitutional authority; (II) the "frisks" were searches within the meaning of the Fourth Amendment, as applied to the states through the Fourteenth, and invalid by that same authority; and (III) the use of the yield of the searches in evidence against the defendants cannot be justified by the public policy of protecting the safety of police officers.

Each of these contentions will be considered in sequence below.

¹⁰ Similarly, in *People v. Pugach*, 15 N. Y. 2d 65 (1965), cert. den. 380 U. S. 936 (1965), where the police searched the defendant's briefcase before taking him to the police station for questioning, any possible danger to the police from a weapon in the briefcase could have been eliminated by the simple expedient of keeping the briefcase away from the defendant in the front seat of the police car, and no search of the briefcase was necessary. See 15 N. Y. 2d at 71 (Fuld, J., dissenting).

I.

The detentions and interrogations were illegal seizures of the person.

This Court has repeatedly held that the Fourth Amendment prohibits any arrest without "probable cause".¹¹ In the context of the instant cases, it is well to bear in mind that this prohibition is based upon the Fourth Amendment's restrictions on "seizures" of "persons":

"... it is the command of the Fourth Amendment that no warrants for either searches or arrests shall issue except 'upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.'"

Henry v. United States, 361 U. S. 98, 100 (1959)

Thus, it is clear that the well settled requirement of probable cause extends to all seizures of the person and is not limited to "arrests" in some restricted, formal sense as the courts below have held.¹²

Each of the so-called "stops" in the instant cases unquestionably constituted an unlawful seizure of the person in violation of the Fourth Amendment.

¹¹ See *Wong Sun v. United States*, 371 U. S. 471 (1963); *Rios v. United States*, 364 U. S. 253 (1960); *Henry v. United States*, 361 U. S. 98 (1959); *Draper v. United States*, 358 U. S. 307 (1959); *Brinegar v. United States*, 338 U. S. 160 (1949); *Carroll v. United States*, 267 U. S. 132 (1925).

¹² See also *Souris, Stop and Frisk or Arrest and Search—The Use or Misuse of the Euphemisms*, 57 J. Crim. L. C. & P. S. 251, 257; *Foote, The Fourth Amendment: Obstacle or Necessity and the Law of Arrest*, 51 J. Crim. L. C. & P. S. 402, 403-04.

There is ample authority for the contention that at the moment Terry and Sibron were first stopped and questioned by a police officer who identified himself as such—at the moment they were restrained of their liberty of motion by a law enforcement authority of the state—they were under arrest for constitutional purposes.¹³ *Henry v. United States*, 361 U. S. 98, 103 (1959) so holds. Those who seek to avoid the consequences of the *Henry* “moment of restriction of liberty” rule of arrest urge that the Government concession in *Henry* that the arrest took place at the moment of the “stop” limits that decision to its particular facts. Such attempts to dilute the holding of *Henry* fail to consider the fact that although the Court was not bound by the Government’s concession,¹⁴ it viewed the facts of the case independently and concluded that “[w]hen the officers interrupted the two men and *restricted their liberty of movement*, the arrest * * * was complete.”¹⁵ There is substantial lower court authority to support this interpretation of *Henry*.¹⁶

¹³ It might parenthetically be noted that the authority granted a police officer under the instant cases to stop and question suspects raises separate substantial questions under *Miranda v. Arizona*, 384 U. S. 436 (1966), should an attempt be made to introduce the suspect’s response to such questioning in evidence. See also Reich, *Police Questioning of Law-Abiding Citizens*, 75 Yale L. J. 1161 (1966).

¹⁴ 361 U. S. at 105 (Clark, J., dissenting).

¹⁵ *Id.* at 103. Cf. *Rios v. United States*, 364 U. S. 253 (1960).

¹⁶ See *United States v. Baxter*, 361 F. 2d 116 (6th Cir. 1966), cert. den. 385 U. S. 134 (1966); *Seals v. United States*, 325 F. 2d 1006 (D. C. Cir. 1963); *United States v. Viale*, 312 F. 2d 595, 601 (2nd Cir. 1963); *Kelly v. United States*, 298 F. 2d 310 (D. C. Cir. 1961); *Coleman v. United States*, 295 F. 2d 555 (D. C. Cir. 1961), cert. den. 369 U. S. 813 (1962); *Green v. United States*, 259 F. 2d 180 (D. C. Cir. 1958), cert. den. 359 U. S. 917 (1959);

In any case, there can be little doubt that once a police officer lays hands on a suspect and forceably restrains his movement or exacts involuntary movement from him, an "arrest" or "seizure" for constitutional purposes has occurred, and philosophic and semantic distinctions between "arrest" and "detention" become (if they have not always been) hopelessly irrelevant. See *Henry v. United States*, 361 U. S. 98, 104 (1959):

"Under our system suspicion is not enough for an officer to *lay hands on a citizen*."

See also *United States v. Rios*, 364 U. S. 253, where, in remanding the cases for resolution of a conflict in testimony, this Court held that if a police officer approached a suspect with his revolver drawn and "took hold of the defendant's arm" (364 U. S. at 257-58) before the officer had probable cause to make an arrest, an unconstitutional arrest or seizure of the person had occurred. 364 U. S. at 261-62.¹⁷

United States v. Scott, 149 F. Supp. 837 (D. D. C. 1957); *Long v. Ansell*, 69 F. 2d 386 (D. C. Cir. 1934); *United States v. Mitchell*, 179 F. Supp. 636 (D. D. C. 1959); *Turney v. Rhoades*, 42 Ga. App. 104, 155 S. E. 112 (1930).

See also Foote, *The Fourth Amendment: Obstacle or Necessity and the Law of Arrest*, 51 J. Crim. L., C. & P. S. 402 (1960). But see *contra*: *United States v. Thomas*, 250 F. Supp. 771 (S. D. N. Y. 1966); *United States v. Vita*, 294 F. 2d 524 (2d Cir. 1961), cert. denied 369 U. S. 823 (1962); *Busby v. United States*, 296 F. 2d 328 (9th Cir. 1961); *United States v. Bonanno*, 180 F. Supp. 71 (S. D. N. Y. 1960) *rev'd on other grounds sub nom.*; *United States v. Bufalino*, 285 F. 2d 408 (2d Cir. 1960).

¹⁷ And see *Green v. United States*, 259 F. 2d 180, 182 (D. C. Cir. 1958), cert. den. 359 U. S. 917 (1959): "Had he remained standing where he was first accosted, or had he merely refused to talk, the police would have lacked probable cause either to arrest or to search him. The officers would have had no justifiable reason to *lay hands upon him*."

If the protections of privacy derived from the Fourth Amendment are to remain meaningful, if they are not to be diluted beyond recognition and beyond the legitimate needs of law enforcement, Fourth Amendment standards should be applied in each instance of governmental restraint of the person of its citizenry, no matter how fleeting, without the substitution of semantic devices for constitutional requirements. For careful analysis "exposes the thinness of the claim that investigative arrests are essential to public safety. On the contrary, the practice of investigative arrests breeds resentment, discourages thorough police work, and sets an official standard of lawlessness."¹⁸

II.

The frisks were illegal searches.

Amici have urged that arrests or seizures of the person for purposes of constitutional analysis occurred before the "frisks," that they were invalid arrests or seizures in the absence of probable cause to make them; and that the suppression of evidence obtained incidental thereto was therefore constitutionally compelled. If the Court so holds, the legal analysis in these cases is over. For it has never been seriously contended that a non-consensual warrantless search, without independent probable cause to search, may be justified by a contemporaneous unconstitutional arrest.

But even if this court should somehow affirm the position taken by the courts below and hold that the "stopping"

¹⁸ Joint Comm. on the District of Columbia, *Crime in the District of Columbia*, H. R. Rep. No. 176, 89th Cong., 1st Sess. 139 (1965) (minority views).

of some or all of the petitioners and appellants in the instant cases constituted an "investigatory detention" which is not itself in violation of the Fourth Amendment, such a non-arrest cannot validate under the Fourth Amendment the frisks of petitioners and appellants which occurred. The Fourth Amendment, as construed by this Court, does not merely prohibit searches incident to unlawful arrests; heretofore any search without a warrant, based upon probable cause has been considered lawful only if made incident to a lawful arrest made upon probable cause. E.g. *Aguilar v. Texas*, 378 U. S. 108, 112, n. 3, 122 (1964); *Rios v. United States*, 364 U. S. 253, 261-64 (1960). There is no authority whatever justifying any search on the basis of its being reasonably incident to an "investigatory detention" made on less than probable cause.

The attempted constitutional justification which has been advanced for the "frisk" is even more tenuous than the constitutional sanction advanced for the "stop." The attempt to exempt the "frisk" from the Fourth Amendment protections has taken two forms. First, by semantic alchemy, it is denied that a "frisk" is a search within the operation of the Fourth Amendment. Second, even where it is conceded that, within the meaning of the Fourth Amendment, the "stop" is a seizure of the person and the "frisk" is a search, both the "stop" and incidental "frisk" are sought to be justified, in the absence of probable cause, as "reasonable searches and seizures," under a test of "reasonableness" which, it is argued, is an interchangeable alternative to the requirement of probable cause.¹⁹

Each of these arguments will be discussed below.

¹⁹ The American Law Institute has taken this view. See MODEL CODE OF PRE-ARREST PROCEDURE (Tent. Draft No. 1, 1966).

A. A "Frisk" Is a Search Within the Meaning of the Fourth Amendment

The suggestion that a police officer who runs his hands over the *outside* clothing on the body of a suspect in the public street without his consent for the express purpose of determining what the suspect has concealed *inside* his clothing is conducting, not a *search*, but a *frisk*—a form of non-search or sub-search which defies Fourth Amendment proscription—would be ludicrous if its consequences were not so destructive of "the right to be let alone."²⁰

Judge Fuld, dissenting in *People v. Rivera*, has properly destroyed this attempted distinction:

"This is nothing but an exercise in semantics; a search by any other name is still a search. Viewed in the perspective of constitutionally protected interests, a police tactic—call it a search or, more euphemistically, a 'frisk'—which leads to discovery of a gun in an individual's pocket by trespassing on his person is indisputably an invasion of privacy. A 'frisk' is a species of search and, in point of fact, both decisions and dictionaries so define it * * * ."

"Free men should no more be subject to having the police run their hands over their pockets than through them. Neither the Fourth Amendment nor, for that matter, the common law of tort distinguishes * * * between a cursory search and a more elaborate one. In both instances, it is the slightest touching which is condemned, and the reason for this is the insult

²⁰ *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

to individuality, to individual liberty, is as grave and as objectionable in the one case as in the other.”²¹

Indeed, in *People v. Taggart*, — N. Y. 2d — (July 7, 1967), the New York Court of Appeals abandoned its distinction between a “frisk” and a “search” and explicitly held that §180-a of the New York Code of Criminal Procedure authorized searches of the person incident to “stops” made on less than probable cause.

The governing principle that any invasion of privacy is subject to constitutional protection was clearly stated as long ago as *Boyd v. United States*, 116 U. S. 616 (1886). In *Boyd*, where the Court struck down a statute requiring importers to produce certain invoices or admit the government’s allegations as to the contents of the invoices, this Court discussed Lord Camden’s decision in *Entick v. Carrington*, 19 How. St. Tr. 1030, and concluded, 116 U. S. at 630:

“The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employees, of the sanctity of a man’s home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where

²¹ *People v. Rivera*, 14 N. Y. 2d 441, 449-450, 201 N. E. 2d 32, 37, 252 N. Y. S. 2d 458, 466 (1964), cert. denied 379 U. S. 978 (1964).

that right has never been forfeited by his conviction of some public offense,—it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of that judgment. In this regard, the Fourth and Fifth Amendments run almost into each other."

The Court further noted that

"constitutional provisions for the security of person and property should be liberally construed. . . . It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." *Id.* p. 635.

It is obvious that the patting of the exterior of one's clothing is an invasion into the "privacies of life", "personal security", and "personal liberty", and that, under the *Boyd* and *Entick* decisions, it is this invasion "that constitutes the essence of the offense" while any distinctions of degree which may exist between such a "frisk" and a "full-blown search" are merely differences as to the "circumstances of aggravation".

It is noteworthy that the specific portions of the *Boyd* decisions quoted above were reaffirmed in *Mapp v. Ohio*, 367 U. S. 643, 646-67 (1961), and more recently in *Berger v. United States*, 388 U. S. 41 (1967).²²

²² Several lower courts have squarely held that a frisk of an accused for weapons is indistinguishable from a "full-blown search"

The attempt to withdraw searches of any particular variety from the operation of the Fourth Amendment by a process of nomenclature and classification is both sterile and dangerous. Calling a search a "frisk" and excluding it from Fourth Amendment controls because of its label is a form of ~~non~~ analysis which will survive neither logic, common experience, nor the decided case law of this Court in the area of individual privacy. The greatest danger of such a device, however, is its destructive effect upon one of the basic guarantees which a society, if it is to remain free, must provide each citizen—the right to walk the public streets secure in the knowledge that, without probable cause to do so, the police cannot put their hands on his or her body for any purpose.

B. A "Frisk" in the Absence of Probable Cause Is Not a Reasonable Search Within the Meaning of the Fourth Amendment

Once it has been determined that a frisk is, in fact and law, a search within the operation of the Fourth Amendment, those who seek constitutional justification for police frisks without either a contemporaneous arrest or a search warrant based upon probable cause, urge that such frisks

of the accused's person. In *White v. United States*, 271 F. 2d 829 (D. C. Cir., 1959), the court held that a law enforcement officer had violated the accused's constitutional rights where:

"The officer had no warrant of any kind and no probable cause to accost appellant, require him to place his hands in a certain position, and frisk him."

In *State v. Collins*, 150 Conn. 488, 491-92, the court held:

"The 'frisking' of the defendant, as he stood against the car, to see if he was armed was also a search of the person."

See also *Ellis v. United States*, 264 F. 2d 372, 374 (D. C. Cir. 1959) cert. den. 359 U. S. 948; *People v. Esposito*, 118 Misc. 867, 871-72, 194 N. Y. S. 326, 331-32 (1922).

are "reasonable" police conduct whenever they are based upon the police officer's "suspicion"—which in New York, at least, may be a purely "intuitive" one—that the subject of the search has committed a crime or is about to commit a crime *in futuro* and that the police officer may be in danger. Since the Fourth Amendment prohibits only "unreasonable" searches and seizures (the argument runs) the reasonableness of the police conduct is a constitutionally adequate substitute for probable cause, and the "frisk" is therefore a valid search.

This contention, although novel, flatly contradicts a wealth of authority construing the Fourth Amendment. More importantly, the adoption of such a construction of the Fourth Amendment would effectively eviscerate the right of privacy the Amendment was designed to protect.

This Court has unmistakably held on numerous occasions that any search of the person of an accused without a warrant is constitutional only if made incident to an arrest based upon "probable cause" to believe that the accused has committed a crime.²³ The historical roots of the requirement of probable cause were explored at length in *Henry v. United States*, 361 U. S. 98, 100-102 (1959). Since the stop and frisk doctrine purports to authorize searches on "suspicion", "reasonable suspicion" or even "intuition", it is relevant to note that in the *Henry* case this Court specifically held:

²³ This Court has never used the "reasonableness" test to take the place of probable cause as a necessary element of a lawful arrest or search. In *United States v. Rabinowitz*, 339 U. S. 56 (1950), this Court enunciated the "reasonableness" test solely for the purpose of determining whether, after an arrest pursuant to a valid warrant, a showing of probable cause to search was sufficient to preclude the necessity of obtaining a search warrant as well.

"As the early American decisions both before and immediately after its [the Fourth Amendment's] adoption show, common rumor or report, *suspicion*, or even '*strong reason to suspect*' was not adequate to support a warrant for arrest. And that principle has survived to this day . . . It was against this background that scholars recently wrote, 'Arrest on mere suspicion collides violently with the basic human right of liberty'. . . . While a search without a warrant is, within limits, permissible if incident to a lawful arrest, if an arrest without a warrant is to support an incidental search, it must be made with probable cause." (361 U. S. 101-102) (emphasis added).

The basic constitutional requirement of "probable cause" is clearly stated in *Ker v. California*, 374 U. S. 23 (1963), a case which has been cited by proponents of the stop and frisk doctrine for the proposition that:

"A State is not precluded from 'developing workable rules' governing searches to meet 'the practical demands of effective criminal investigations and law enforcement' if the State does not violate the constitutional standard of what is reasonable."²⁴

Although the majority of this Court divided evenly on applying the Fourth Amendment's constitutional criteria to the facts of the *Ker* case, eight of the nine justices unequivocally agreed that probable cause is an absolute necessity for any search. Mr. Justice Clark, with the concurrence of Justices Black, Stewart, and White, observed:

²⁴ *People v. Rivera*, 14 N. Y. 2d 441, 448 (1964); see also *People v. Peters*, 18 N. Y. 2d 238, 247 (1966); *State v. Terry*, 214 N. E. 2d 714, 121-22 (1966); *State v. Dilley*, 49 N. J. 460, 470 (1967).

"The evidence at issue, in order to be admissible, must be the product of a search incident to a lawful arrest, since the officer had no search warrant. The lawfulness of the arrest without a warrant, in turn, must be based upon probable cause . . ." (374 U. S. at 34-35).

And Mr. Justice Brennan noted in an opinion in which the Chief Justice, Mr. Justice Douglas, and Mr. Justice Goldberg concurred:

"It is much too late in the day to deny that a lawful entry is as essential to vindication of the protections of the Fourth Amendment as for example, probable cause to arrest or a search warrant for a search not incident to an arrest" (374 U. S. at 53).

In *Aguilar v. Texas*, 378 U. S. 108 (1964) both the majority and dissenting justices of this Court again agreed that the Fourth Amendment requires "probable cause" for any search whether with or without a warrant (378 U. S. at 112, n. 3 and 378 U. S. at 122).

Thus, our analysis of the "frisk" as a Fourth Amendment violation returns to its place of beginning. A frisk must be a search as that term is used in the Fourth Amendment. And as a search it cannot be a reasonable search unless it is accompanied by probable cause to arrest or search. Since, in the cases at bar, neither probable cause to arrest nor probable cause to search could be shown, except by use of the yield of the frisk itself, the frisks themselves were unreasonable searches and their yield should have been suppressed by command of the Fourth and Fourteenth Amendments.

III.

Protection of police officers cannot justify the use of the yield of the frisk in evidence against petitioners.

Amici have demonstrated (Argument II, *supra*) that a frisk for weapons without probable cause to arrest or search is an unreasonable search expressly prohibited by the Fourth Amendment. It follows that the yield of such a search must be suppressed by virtue of the exclusionary rule, made applicable to the states in *Mapp v. Ohio*, 367 U. S. 643 (1961).

But the sponsors of exceptional constitutional treatment for such frisks urge that society's substantial interest in protecting the lives of its law enforcement authorities in the course of their investigation of crime compel relaxation of settled constitutional principles to achieve this important societal purpose. They urge that such searches are necessary for crime investigation and police protection, that they are, therefore, not constitutionally infirm, and that, as a result, the exclusionary rule does not reach their fruits. Because everyone is quite correctly concerned with the safety of the police in the performance of their dangerous and highly important function of preserving order, the argument has a certain surface appeal.

Upon closer inspection, however, the argument disintegrates entirely. For (A) adequate exceptions for police necessity already exist in the Fourth Amendment case law, and the addition of new ones in the "stop and frisk" sphere is not necessary for the protection of legitimate police interests, and (B) as a practical matter, the use in evidence of the yield of searches made in violation of

clear Fourth Amendment principle would provide great incentive for police officers, under the guise of self-protection, to make general searches of the person, thus frustrating the great purposes of the Fourth Amendment which the exclusionary rule was designed to protect.

Each of these contentions will be considered below.

**A. *There Is No Legitimate Police Need for the "Frisk"*
*Exception to Fourth Amendment Protections***

When police necessity is urged as a ground for legitimizing frisks without probable cause, the listener has the unerring feeling that he has heard the argument somewhere before. It was precisely this argument that was made to obtain this Court's approval of the warrantless search incidental to a valid arrest, an exception to the general requirement that searches must be by warrant.²⁵

Originating as a dictum justifying the search of the person of an accused pursuant to valid arrest,²⁶ it was expanded to include the immediate place of arrest²⁷ and

²⁵ "Unquestionably, when a person is lawfully arrested, the police have the right, without a search warrant, to make a contemporaneous search of the person of the accused for weapons or for the fruits of or implements used to commit the crime * * *. This right to search and seize without a search warrant extends to things under the accused's immediate control * * * and, to an extent depending on the circumstances of the case, to the place where he is arrested * * * ." *Preston v. United States*, 376 U. S. 364, 367 (1964). See also *Schmerber v. California*, 384 U. S. 770 (1966); *United States v. Ventresca*, 380 U. S. 102 (1965); *United States v. Rabinowitz*, 339 U. S. 56 (1950); *Harris v. United States*, 331 U. S. 145 (1947); *Marron v. United States*, 275 U. S. 192 (1927); *Agnello v. United States*, 269 U. S. 20 (1925); *Weeks v. United States*, 232 U. S. 383 (1914).

²⁶ *Weeks v. United States*, 232 U. S. 383 (1914).

²⁷ *Agnello v. United States*, 269 U. S. 20 (1925).

the entire four-room apartment of an accused who was arrested in one of the rooms.²⁸ Although the "incidental search" exception to the requirement of a warrant has gone far beyond its origins and, perhaps, its rationale,²⁹ there is no denying the fact that it was originally conceived as a means of protecting the arresting officer against attack by concealed weapons and as a means of preventing the immediate destruction of fruits or instrumentalities of crime.³⁰

Never, until the "stop and frisk" cases, however, has there been any claim that an officer may utilize an *invalid* arrest to justify the seizure and use of evidence for which he was *not* entitled to search.

This Court has never heretofore permitted any relaxation of the constitutional requirements for searches and seizure on the grounds of self-defense of the police officer. Any such exception on grounds of expediency would seem markedly inconsistent with this Court's many holdings that fundamental Fourth and Fifth Amendment rights may not be violated in the supposed interests of better law enforce-

²⁸ *Harris v. United States*, 331 U. S. 145 (1947).

²⁹ See Justice Frankfurter's strong critique of the extension of the "incidental search" rule in his dissent in *United States v. Rabinowitz*, 339 U. S. 56, 68-86 (1950).

³⁰ "The rule allowing contemporaneous searches is justified . . . by the need to seize weapons and other things which might be used to assault an officer or effect an escape, as well as by the need to prevent the destruction of evidence of the crime—things which might easily happen where the weapon or evidence is on the accused's person or under his immediate control." *Preston v. United States*, 376 U. S. 364, 367 (1964); *United States v. Ventresca*, 380 U. S. 102 (1965). See also *United States v. Rabinowitz*, 339 U. S. 56, 72 (Frankfurter, J., dissenting) (1950); *Palmer v. United States*, 203 F. 2d 66, 67 (D. C. Cir. 1953); and Note, 17 *BAYLOR L. R.* 312 (1965).

ment or greater public safety. E.g., *Miranda v. Arizona*, 384 U. S. 436, 479-82 (1966); *Mapp v. Ohio*, 367 U. S. 643, 659-60 (1961).

Moreover, the claim that the right to stop and frisk without probable cause is necessary for police or public safety is at best an unproven one. Cf. *Berger v. United States*, 388 U. S. 41, 60 (1967). As Judge Fuld stated in his dissenting opinion in No. 74 below:

"Of course, there are risks inherent in investigatory activities undertaken by the police but, certainly, it does not follow from that that the police are privileged, absent probable cause, to search anyone who looks or acts suspiciously and to use against him any articles they may find on his person. As I previously observed, 'Other methods are available whereby the police may protect themselves while carrying on their investigations, other procedures which, if utilized, will safeguard the police and the community from the criminal minority without destroying the sense of dignity and freedom with which the law-abiding majority walk the streets.' (*People v. Rivera*, 14 N. Y. 2d 441, 452 [dissenting opinion], cert. den. 379 U. S. 978.)" 18 N. Y. 2d at 248.³¹

Amici submit that the warrantless search of the person and the area within his immediate control permitted incident to a contemporaneous valid arrest is sufficient recognition of the police officer's legitimate need to protect him-

³¹ Justice Souris of the Supreme Court of Michigan has also expressed doubts as to the necessity for stop and frisk legislation: Souris, *Stop and Frisk, or Arrest and Search—The Use and Misuse of Euphemisms*, 57 J. Crim. L., C. & P. S. 251 (1966).

self, without fashioning new exceptions to Fourth Amendment principle which would eliminate the need for "some valid basis in law [to justify] the intrusion" of arrest or search.³²

B. *The Deterrent Effect of Strict Application of the Exclusionary Rule Will Keep Invasions of Privacy to a Practical Minimum.*

The Court of Appeals in *Terry* stood logic upon its head by pointing out, as part of its rationale for refusing to enforce the exclusionary rule that—even if "stops and frisks" without probable cause are unconstitutional—vigorous application of the exclusionary rule in the "stop and frisk" area is inappropriate since the rule will have no deterrent effect upon police officers who, not wishing to commit suicide, will continue to frisk suspects for weapons, no matter what courts choose to do with the resulting evidence.³³ Such reasoning ignores this Court's clear holding in *Mapp v. Ohio*, 367 U. S. 643 (1963), that "the exclusion-

³² *Johnson v. United States*, 333 U. S. 10, 17 (1948).

³³ Paraphrasing will not do justice to the reasoning of the Court of Appeals on this point. "The Mapp exclusionary rule was imposed upon the states not because of some command inherent in the fourth amendment, but rather because the Supreme Court believed that it was the only way the police could be forced to respect the fourth amendment. If the police could not obtain a conviction using evidence unlawfully obtained, they would have no incentive to conduct illegal searches. If we keep in mind this *raison d'être* of the exclusionary rule, we can guard against confusion in the attendant rules that are developed. *A judicial rule rendering evidence produced as a result of a frisk inadmissible would fail to deter the police from frisking suspects believed to be armed as police frisk for their own protection rather than for the purpose of looking for evidence. A rule of admissibility in such cases could only result in allowing the armed criminal to go free although failing to any meaningful extent to protect individual liberty.*" (Emphasis added.)

ary rule is an essential part of both the Fourth and Fourteenth Amendments,"³⁴ and is not a discretionary rule of evidence for courts to apply or withhold from application as they deem appropriate. The Court of Appeals' reasoning also does not consider the possibility, well evidenced by the facts of No. 63 and No. 74,³⁵ that there are law enforcement personnel who, in an excess of zeal, engage in general searches of the persons of suspects for purposes of general harassment and to see what incriminating evidence they can find even though they have no reason at all to fear for their safety.³⁶ Those of us who are not as convinced that the police will use their vast power with such unanimous *bona fides*, but who adhere instead to the principle announced by this Court, that "[p]ower is a heady thing; and history shows that the police acting on their own cannot be trusted,"³⁷ must disassociate ourselves from the rosy view of law enforcement embraced by the Court of Appeals.

In view of the fact that general exploratory searches will unquestionably occur under the guise of self-protection, it seems perfectly clear that the incentive for such unconstitutional police conduct will be materially reduced only by vigorous application of the Fourth Amendment ex-

³⁴ 367 U. S. at 657. See also, *Mapp v. Ohio*, 367 U. S. at 655 (1961); *Ker v. California*, 374 U. S. 23, 30 (1963).

³⁵ See also *People v. Pugach*, 15 N. Y. 2d 65, 204 N. E. 2d 176 (1964), cert. den. 380 U. S. 936 (1965); *People v. Machel*, 234 Cal. App. 2d 37, 44 Cal. Rptr. 126 (1st Dist. Ct. of App. 1965), cert. den. 382 U. S. 839 (1965); *People v. Garrett*, 238 Cal. App. 2d 324, 47 Cal. Rptr. 731 (3rd Dist. Ct. App. 1965).

³⁶ The Court of Appeals opinion disingenuously notes that "police officers seem unanimous in stating that frisking is done for self-protection and not as a mere evidentiary fishing expedition."

³⁷ *McDonald v. United States*, 335 U. S. 451, 456 (1948).

clusionary rule. If law enforcement authorities know that weapons and other evidence seized during the course of an unconstitutional frisk will be suppressed by constitutional command, the number of unconstitutional invasions of privacy will be reduced, at the very least, to those instances where the officer genuinely fears for his safety.

And thus the threat of "stop and frisk" police procedures, another of the new devices "that have emerged from century to century wherever excessive power is sought by the few at the expense of the many"³⁸ will be laid to rest.

CONCLUSION

Amici have urged the constitutional infirmity of an on-the-street detention as an illegal arrest, the invalidity of an accompanying "frisk" as an unreasonable search, and the barrenness of the attempted justification of both in the name of crime prevention and the safety of the interrogating officer. Despite the clamor of the constabulary to the contrary, the highly critical area of on-the-street arrests and accompanying searches demands no relaxation of Fourth Amendment standards, but vigorous adherence to them. Otherwise, "a method will have been devised by which the Fourth Amendment's prohibition against unreasonable searches and seizures may be evaded and the exclusionary rule of *Mapp v. Ohio*, * * * to a large extent, written off the books."³⁹

³⁸ Black, J., dissenting in *Adamson v. California*, 332 U. S. 46, 89 (1947).

³⁹ Fuld, J., dissenting in *People v. Rivera*, 14 N. Y. 2d 441, 448, 201 N. E. 2d 32, 36 (1964).

The requirement of probable cause is a compromise which has been found for accommodating the citizen's basic right to privacy and the need for effective criminal investigation and law enforcement. "Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice."⁴⁰

If probable cause is to continue to be a workable and useful concept to balance the citizen's right of privacy against police necessity, it ought not be relegated to a caricature of a stricture against law enforcement excesses, a status which must surely follow if police officers, with constitutional sanction, are permitted—rather, encouraged—to compel suspects, during a period of non-arrest, to disgorge incriminating information and evidence which will raise their suspicions to probable cause and thereby validate a subsequent arrest. It is too late in the day and too destructive of constitutional values to attempt to "justify the arrest by the search and at the same time justify the search by the arrest." *Johnson v. United States*, 333 U. S. 10, 15 (1947).

Accordingly, *amici* join in, and call upon this Court to make its own, the stirring language of Judge Fuld:

" . . . The loss of liberty entailed in authorizing a species of search on the basis of mere suspicion is too high a price to pay for the small measure of added security it promises. Other methods are available whereby the police may protect themselves while carrying on their investigations, other procedures which, if utilized, will safeguard the police and the community from the criminal minority without de-

⁴⁰ *Brinegar v. United States*, 338 U. S. 160, 176 (1949).

stroying the sense of dignity and freedom with which the law-abiding majority walk the streets.

"To what end security if liberty be sacrificed as its price? The privacy which the Constitution guarantees is assured to the best of men only if it is vouchsafed to the worst, however distasteful that may be. Thus, although the defendant before us undoubtedly merits the punishment provided by law for carrying a concealed weapon, I venture that it is better that he go free than that we sanction a significant inroad on the rights of all our citizens."⁴¹

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September 1967

⁴¹ 14 N. Y. 2d at 452-53, 201 N. E. 2d at 39.



IN THE
Supreme Court of the United States

OCTOBER TERM, 1967

No. 63

NELSON SIBRON,

Appellant,

—against—

THE STATE OF NEW YORK,

Respondents.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENTS

AARON E. KOOTA
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Kings County

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IN THE
Supreme Court of the United States
October Term, 1967

No. 63

NELSON SIBRON,

Appellant.

—against—

THE STATE OF NEW YORK,

Respondents.

BRIEF FOR RESPONDENTS

Statement

This appeal reviews a judgment of the New York Court of Appeals dated July 7, 1966 which affirmed without opinion an order of the Appellate Term of the Supreme Court, Second Judicial Department, dated October 15, 1965. That order affirmed a judgment of conviction entered in the Criminal Court of the City of New York, County of Kings, on April 23, 1965 which imposed upon appellant a sentence of six months imprisonment in the New York City Workhouse following his conviction for a violation of Public Health Law, Section 3305 in the misdemeanor possession of narcotic drugs. The judgment of the Court of Appeals is reported in 18 N.Y. 2d. 603. The order of the Appellate Term is unreported.

Jurisdiction

The jurisdiction of this Court rests upon Title 28 U.S.C. Section 1257(2).

Questions Presented

Appellant contends:

That Section 180-a of the New York Code of Criminal Procedure authorizes an unreasonable search in violation of the Fourth and Fourteenth Amendments to the Federal Constitution; and that,

Even if, assuming *arguendo*, the statute is not in its terms unconstitutional, it was, in its application to the case at bar, unconstitutionally utilized.

It is our answer that the statute as drawn, and as interpreted by the New York Court of Appeals, does not violate the Fourth or Fourteenth Amendments.

We do, however, concede that that Court erroneously applied the statute in the case at bar.

Constitutional and Statutory Provisions Involved

Section 180-a of the Code of Criminal Procedure.*

The Fourth Amendment to the United States Constitution provides:

“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and

* The text of the statute appears at p. 8 of this brief.

no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fourteenth Amendment, Section 1 to the United States Constitution provides:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Record Facts Material to the Questions Presented

A complaint filed by Patrolman Anthony Martin in the Criminal Court of the City of New York, County of Kings, charged appellant with a violation of Penal Law, Section 1751 in the felonious and unlawful possession of a quantity of the narcotic drug, heroin.

Appellant's motion to suppress the narcotics on a claim of unlawful search and seizure was denied on March 31, 1965 at the conclusion of a hearing. On April 23, 1965, he pleaded guilty to possession as a misdemeanor and was sentenced as a multiple narcotics offender to a term of imprisonment of six months in the Workhouse.

On the appeal to the Appellate Term of the Supreme Court, Second Judicial Department from the judgment of

conviction, the Court properly (and by virtue of the provisions of Code Crim. Pro. Section 813-c) considered the concomitant appeal from the order denying the motion to suppress; and then affirmed the order and the judgment without opinion.

The Court of Appeals in turn affirmed the order of the Appellate Term without opinion, Fuld and Van Voorhis, JJ. dissenting (18 N.Y. 2d 603). The Court amended its remittitur to state the question of the constitutionality of Code Crim. Pro. § 180 (18 N.Y. 2d 723).

Both New York appellate courts were concerned specifically with, and ultimately decided, only the question of the constitutional legality of the arresting officer Martin's procurement of the drugs, the possession of which formed the basis of the prosecution. We therefore present for this Court's convenience a summary of the testimony taken on the suppression hearing.

The Hearing

Appellant, a drug addict* (7) **with a record of prior criminal convictions for burglary and possession of narcotics, testified that on March 9, 1965 the patrolman, then in uniform, met him in a restaurant and, after directing him to come outside and after asking him "if I knew what he was looking for" (to which appellant answered "No"), searched him (8) and took from his jacket pocket ten bags of heroin "which I possessed at the time." No search warrant was shown (9).

* The record contains no proof that the officer had any knowledge of appellant's addiction.

** Page references are to the Transcript of the Record.

Appellant testified under cross-examination that in the restaurant he had been talking to several narcotic addicts about other narcotics addicts (12).

Patrolman Anthony Martin had, during the hours of 4:00 P. M. to Midnight on March 9th (13), witnessed appellant in conversations with a number of persons known to the policeman to be narcotic addicts (14). Martin later followed him into the restaurant where appellant was talking to three other addicts (15) and asked him to come outside. There the patrolman said: "You know what I am after," whereupon appellant reached into his own pocket "and he held something into his hand." The patrolman simultaneously "went into his pocket." As he did so "inside his pocket I saw in his hand and in his pocket he was ready to grab this cellophane—actually it was a metal tin foil wrapper." Martin "grabbed it off him." "It" was ten glassine envelopes (17).

On cross-examination there developed the only evidence which the record contains relative to the patrolman's apprehension of danger:

"Q. When he reached into his pocket, you didn't think he was reaching for a weapon? A. I thought he might have been.

Q. But he came up with a piece of tin foil; didn't he? A. Yes.

Q. And that's when you grabbed his hand? A. Well, he had his hand in his pocket. I put my hand in his pocket. At that time I caught him with his hand in his pocket."

Redirect examination of the officer made it clear that Martin had no knowledge of the subject—or tenor—of appellant's conversations with the narcotic addicts (18).

The hearing Court, after indicating some doubt concerning the legality of the patrolman's procedure (19), ultimately denied the motion upon the ground that "the police officer's action was predicated on probable cause" (21).

Foreword

The annals of organized communities known to history show an unremitting struggle by the community to protect itself against those members who break its laws. (Given the demonstrated imperfectibility of human nature, it is probable that pre-historic communities faced, and dealt with, the same problem.) The current experiences of our own contemporary society show that the struggle is increasing in intensity and magnitude to the point where only an unwarranted optimism can assume that our society is, or will shortly be, victorious over its internal enemies.

In dealing with the problem of crime the community follows various paths of resistance to, and attempted victory over, the depredations of criminals.

The first approach is, by an understanding of the causes of crime, to develop means and practices adequate to remove these causes. In our own day numerous studies have been undertaken and much money has been expended. It needs no extended discussion to demonstrate that with all possible good will and despite the utilization of great powers of understanding and expenditure of much treasure, the solution of our current problems of crime cannot be immediate. Indeed, we shall be fortunate if the answers are not too long delayed.

When society reaches an understanding, or when, even, it attains a partial knowledge, of the causes of crime it adopts manifold methods of eradicating these causes. Energy is devoted to the spread of education, the amelioration of unemployment and the distribution of opportunity, in order that in this field, at least, some of the cancer causes of crime—ignorance and poverty—may be removed; and where not completely removed, at least minimized.

There always remains, however, the hard core of the criminal cadre. Society therefore bends its efforts to the apprehension of the criminal, to his trial in the Courts of justice, and to his conviction according to constitutional concepts of due process.

Finally, when through the procedures of apprehension, trial and conviction, the criminal is imprisoned, some effort is devoted to the task of reformation, in the hope and to the end that when the criminal is returned to society, he will not again be a menace or a detriment.

It is obvious beyond need for elaboration that none of the societal purposes which we have thus in briefest form outlined can be attained unless first of all the criminal is apprehended. The criminal who is not caught cannot be convicted and, hopefully, reformed. It is equally apparent that the community's first line of defense—indeed, its only real defender and protector—is the peace officer. This being so, no rule of law which attempts to insure the safety of the officer in the performance of his obligatory duty should be disturbed, except under the compulsion of the clearest constitutional necessity.

It is therefore our purpose in this brief to demonstrate: first, that there is a compelling necessity in our contempo-

rary society to protect the peace officer; second, that the powers granted to him by New York's Code of Criminal Procedure, Section 180-a are reasonably adapted to the necessary purpose of protection and not broader in practice than the underlying necessity of protection; and third, that the statute does not offend the constitutional prohibitions of the Fourth Amendment or the affirmative due process requirements of the Fourteenth Amendment.

POINT I

Code of Criminal Procedure, Section 180-a should be declared to be constitutional in purpose and scope.

The statute provides:

“1. A police officer may stop any person abroad in a public place whom he reasonably suspects is committing, has committed or is about to commit a felony or any of the crimes specified in section five hundred fifty-two of this chapter, and may demand of him his name, address and an explanation of his actions.

“2. When a police officer has stopped a person for questioning pursuant to this section and reasonably suspects that he is in danger of life or limb, he may search such person for a dangerous weapon. If the police officer finds such a weapon or any other thing the possession of which may constitute a crime, he may take and keep it until the completion of the questioning, at which time he shall either return it, if lawfully possessed, or arrest such person. Added L. 1964, C. 86, Section 2, eff. July 1, 1964.”

The statute permits two affirmative acts by the police officer. He is given authority in the first instance to stop

any person in a public place provided he reasonably suspects that the person is presently committing, has committed or is about to commit a felony or certain specified misdemeanors; and having thus stopped him, to demand his name, address and an explanation of his actions. *It is to be noted that the officer has no powers of continued detention and that the person thus stopped is neither required to answer the officer's questions nor to remain in his presence.* Because the statute grants no power to detain, the issue of detention is not present in the case at bar. For this reason we do not discuss those Codes and statutes which in varying degree do include the power to detain, either in or out of the police station house: Uniform Arrest Act, Section 2; Delaware Code Annotated Title 11, Sections 1902-1903; New Hampshire Rev. Laws, Sections 594:2-594:3; Rhode Island Gen. Laws, Sections 12-7-1—12-7-12; American Law Institute, Model Code of Pre-Arrest Procedure, Section 2.02, tentative draft No. 1, p. 6, March 1, 1966. The second power granted the officer is that if he reasonably suspects the existence of danger to his own life or limb, he may search the stopped person for a dangerous weapon.*

The Court of Appeals first construed the statute in *People v. Rivera*, 14 NY 2d 441, cert. den. 379 U.S. 978, even though the statute, although already enacted, did not control the disposition of the case because *Rivera* had committed the crime of unlawful possession of a contraband pistol prior to the effective date of its operation. Nevertheless, in his reasoning Bergan, J. was guided by the close resemblance

* The subsequent action of the officer, in the return or retention of a weapon or any other criminal contraband thus found, is discussed at p. 43 of this brief.

between the provisions of the statute and the common law doctrines under which he (for a majority of six judges on a Court of seven members) concluded that the police act of stopping and searching Rivera was permissible and not violative of the Fourth Amendment. This act consisted of a "frisk"; that is, a patting of the defendant's outer clothing resulting in the discovery of a pistol. Judge Bergan thus stated both the duty and the power of the police under the circumstances of the case:*

"The first problem is the authority of the police in the circumstances shown here to stop and question defendant. The validity of subsequent police action would in turn necessarily rest on the initial right to make the immediate and summary street inquiry.

The authority of the police to stop defendant and question him in the circumstances shown is perfectly clear. The business of the police is to prevent crime if they can. Prompt inquiry into suspicious or unusual street action is an indispensable police power in the orderly government of large urban communities. It is a prime function of city police to be alert to things going wrong in the streets; if they were to be denied the right of such summary inquiry, a normal power and a necessary duty would be closed off."

He continued:

"And the evidence needed to make the inquiry is not of the same degree or conclusiveness as that required for an arrest. The stopping of the individual to inquire is not an arrest and the ground upon which

* These were that the defendant and his companion had in the early morning hours acted suspiciously in a New York City neighborhood with a high incidence of crime, and had sought to leave the scene rapidly when they observed the police.

the police may make the inquiry may be less incriminating than the ground for an arrest for a crime known to have been committed. It is enough for the purposes of this case to rule that the police were justified in the record as here developed in stopping and in questioning defendant."

Judge Bergan traced the ancestry of the police-power to stop and question to the common law (2 Hawkins, Pleas of the Crown, 122, 129 (6th ed., 1777); 2 Hale, Pleas of the Crown 89, 96-97 (Amer. ed., 1847); *Lawrence v. Hedger*, 3 Taunt. 14, 128 Eng. Rep. 6 (Common Pleas, 1810); *People v. Marendi*, 213 N.Y. 600, 609, saying:

"Indeed, the right of the police to stop and question the defendant in such circumstances as those disclosed by this record was recognized at common law. It is extensively treated both by statute and by judicial decision as a reasonable and necessary police authority for the prevention of crime and the preservation of public order (citing.)" *

The N.A.A.C.P. *amicus* brief (p. 19, note 35) disputes the accuracy of Judge Bergan's statement of the police powers lineage and argues that his construction, and that of other courts, of the cited English authorities rests upon a misconception of the English use of the term "reasonable suspicion". It is contended that the phrase does not in reality mean what it says but "is the equivalent of American constitutional 'probable cause'".

* To these citations may be added *Queen v. Tooley*, 92 Eng. Rep. 352 in which the Judge after upholding the right of the Constable to stop and inquire said: "It is not the Constable suspecting that will justify his taking up a person, but it must be just grounds of suspicion * * *"

The New York acceptance of the common law power to stop and question without the necessity of a formal arrest and upon reasonable suspicion is supported by the similar holdings of the Court of Appeals for the Second Circuit, *United States v. Vita*, 294 F 2d 524, 530; *United States v. Middleton*, 344 F 2d 78, 83; and of other Courts: *Goss v. State*, 390 P 2d 220 (S. Ct. Alaska), cert. den. 379 U.S. 859; *State ex rel. Branchaud v. Hedman*, 299 Minn. 375; *State v. Hope*, 84 N.J. Super. 551; *State v. Terry*, 50 Ohio App. 2d 122; *People v. Michelson*, 59 Cal. 2d 448; *United States ex rel. Corbo v. LaVallee*, 220 F 2d 513, 518, cert. den. 361 U.S. 950). Indeed Judge (now Chief Judge) Fuld, the sole dissenter in *Rivera*, *supra*, wrote:

"I have no doubt that the police, in the proper performance of their duties, have a responsibility to investigate suspicious activity and that one permissible form of investigation is the temporary stopping and questioning of individuals so engaged. (see, e.g., *Ellis v. United States*, 264 F 2d 372, cert. den. 359 US 998; *Green v. United States*, 259 F 2d 180, cert. den. 359 US 917)."

We submit that the authority of these courts is paramount.

If the right to stop and question upon reasonable suspicion is established—and it is our submission that the authorities we have cited are determinative that such right is established—the question presents itself: is the police officer, acting in the obligatory performance of his public duty, entitled to protection against the hazards of that performance? Put in another form: is there any constitutional prohibition—and specifically, are the Fourth and Fourteenth Amendments constitutional prohibitions—against minimizing the ever-present danger to the police officer incident to his obligatory performance of his public duty?

In *Rivera*, Judge Bergan answered:

"If we recognize the authority of the police to stop a person and inquire concerning unusual street events we are required to recognize the hazards in this kind of public duty. The answer to the question propounded by the policeman may be a bullet; in any case the exposure to danger could be very great. We think the frisk is a reasonable and constitutionally permissible precaution to minimize that danger. We ought not, in deciding what is reasonable, close our eyes to the actualities of street dangers in performing this kind of public duty."

Judge Bergan was not unmindful of, nor did he disregard, the argument (p. 446) "advanced by defendant that the exterior touching is a 'search' in the full meaning of that term and carries against its validity all of the weight of judicial interpretation (citing)." He thus met the issue (p. 446 seq.):

"It is something of an invasion of privacy; but so is the stopping of the person on the street in the first place something of an invasion of privacy. The frisk is less such invasion in degree than an initial full search of the person would be. It ought to be distinguishable also on pragmatic grounds from the degree of constitutional protection that would surround a full-blown search of the person.

That kind of search would usually require sufficient evidence of a committed crime to justify an arrest or be an incident to a lawful arrest (*Harris v. United States*, 331 US 145 (1947)). In the end, as in most close issues of public policy, a court is called upon to strike a fair balance of competing interests.

And as the right to stop and inquire is to be justified for a cause less conclusive than that which would

sustain an arrest, so the right to frisk may be justified as an incident to inquiry upon grounds of elemental safety and precaution which might not initially sustain a search. Ultimately the validity of the frisk narrows down to whether there is or is not a right by the police to touch the person questioned. The sense of exterior touch here involved is not very far different from the sense of sight or hearing—senses upon which police customarily act.”

And, countering the defense argument that, however limited the “frisk” might be, it was nevertheless a search, he answered (447):

“The constitutional restriction is against unreasonable searches, not against all searches. And what is reasonable always involves a balancing of interests: here the security of the public order and the lives of the police are to be weighed against a minor inconvenience and petty indignity. A similar police procedure has long been sustained in California (*People v. Martin*, 46 Cal. 2d 106 (1956)).”

He found support for this “balancing of interest” in the permissive language of this Court in *Ker v. California*, 374 U.S. 23, 34: .

“The States are not thereby precluded from developing workable rules governing arrests, searches and seizures to meet ‘the practical demands of effective criminal investigation at law enforcement’ in the States.”

And he concluded:

“The precautionary procedures followed by police in questioning this defendant are within the standard thus established by the Supreme Court. They

meet the 'practical demands of effective criminal investigation.' And in our view the steps taken here were not unreasonable."

We assert the belief that if the Court of Appeals had continued to confine its analysis of Section 180-a as a grant of permission only to "frisk" when justified by a reasonable suspicion of personal danger to the policeman, and if the Court had subjected later cases to this test, no problem of constitutional wrong would be presented. Candor compels the concession, however, that in all (except one*) of the cases decided by the Court of Appeals subsequent to *Rivera*, the Court has progressively widened the scope of the "frisk" to the point where the "frisk" has become a search of the person or property of the defendant.

Thus, in *People v. Pugach*, 15 N Y 2d 65, the defendant's briefcase was opened by the police and a loaded firearm discovered therein. He was then seated in an automobile, surrounded by police officers. The Court, in an opinion concurred in by six members, considered that the weapon was concealed upon his person in terms of Penal Law, Section 1897 prohibiting such possession, and concluded that therefore the search of the briefcase was in reality part of the "frisk" of the person. With all deference due to the majority, we are nevertheless compelled to agree with the opinion of Fuld, J., the sole dissenter, that the search was a search and not a frisk.

* *People v. Peters*, 18 NY 2d 238. We believe that in *Peters* the Court of Appeals was warranted in basing its approval of an ultimate search of defendant's person on the fact of a preliminary "frisk" which had disclosed "something hard which could have been a knife." Since *Peters* is a companion case and will be separately argued before this Court, we do not further discuss it here.

The Court next dealt with the case at bar and with *People v. Peters, supra*, and affirmed the judgment of conviction without opinion, but clearly upholding the legality of what it conceived to be a frisk.*

In its last construction of Section 180-a (*People v. Taggart*, 20 N Y 2d 335) the Court finally (and again with Fuld, now Chief Judge as the sole dissenter) reached the position that the statute, under the appropriate circumstances of reasonable suspicion concerning the commission, either past, present or imminent, of crime and, also, of reasonable apprehension by the officer of personal danger, does authorize a full search of the person.

It is important to analyze the facts of *Taggart* and the reasoning of the opinions written by Breitel, J. for the majority and by VanVoorhis, J. in concurrence.

A detective, alerted by an anonymous telephone call that a man with described physical characteristics and wearing "white chino-type pants" was standing on a street corner with "a loaded 32 calibre revolver in his left-hand jacket pocket," found Taggart at that corner wearing such pants and surrounded by "a group of children that had just finished howling." He searched Taggart and took a revolver from the indicated jacket pocket. The search was not preceded by a frisk, nor did the detective preliminarily "notice any bulge in the defendant's pocket prior to the search as the weapon 'was inside the lining of the jacket'." Breitel, J., conceding that the case involved a search and not a "frisk," wrote:

* We reserve the expression of our attitude towards this case until p. 45 of this brief. Similarly, we reserve our discussion of the limited dissent of VanVoorhis, J. until p. 42 of this brief.

"This case raises a very serious problem which has not yet been faced directly under the newly evolved rules excluding evidence obtained unlawfully under the principle in *Mapp v. Ohio* (367 US 643). There are exigencies affecting life, limb or grave property damage in which the police received information of crime, not sufficient to establish probable cause for arrest and incidental search, and yet which, to any reasonable man, demand the taking of police action to prevent serious harm. In such cases it is not enough to say that nothing should be done, or that if something is done, the resultant evidence should be suppressed. To do nothing is to succumb supinely to serious injury to members of the public or to the State itself, sincerely believed to impend, particularly as the test for action is supposed to be what a reasonable man would do under the circumstances (see *Ker v. California*, 374 US 23, 34-35; *Johnson v. United States*, 333 US 10, 13-14). To tolerate unconstitutional action as a matter of necessity, as some argue, but then to reject use of the evidence obtained, is hardly a proper way to justify illegal conduct as necessary, on the one hand, but to limit, on the other hand, the consequences of those actions as illegal. Needless to add, the serious problem is suggested only in cases involving serious personal injury or grave irreparable property damage and not by the problems associated with the enforcement of sumptuary laws, such as gambling, and laws of limited public consequence, such as narcotics violations, prostitution, larcenies of the ordinary kind, and the like. In this case a loaded pistol was involved. And one could hypothesize parallel cases involving explosives, poisons, or the larceny of an irreplaceable classic work of art. The presence of the suspect among a group of children is a particular circumstance suggesting that the occasion was not

one in which a preliminary interrogation and perhaps a limited frisk before search was indicated, if the safety of the children or the police officer was to be respected. For the police to have ignored the information received is not an acceptable thesis, despite the anonymity and, therefore, the undetermined reliability of the source.

The discussion is not whether exigent circumstances justify a departure from constitutional limitations. That view is impermissible. The point is that the Constitution forbids 'unreasonable' searches and what is reasonable is determined by the circumstances and the exigencies are not to be ignored (see Camara v. Municipal Ct., 387 US 523, 538-539).' (Italics ours).

He concluded:

"Even assuming that under normal circumstances the 'search' allowed by section 180-a should be limited to a 'frisk', the action of the detective in this case was proper, because of the additional circumstances. Delaney had a reasonably based suspicion not only that defendant was carrying a pistol but also that the weapon was located in his left-hand jacket pocket. It would seem unreasonable to require an officer in that situation to engage in a preparatory and undoubtedly dangerous frisk—particularly in view of the fact that defendant was standing in the middle of a group of children at the time of the search."

The concurring opinion of VanVoorhis, J. is equally illuminating:

"For reasons cogently stated in Judge Breitel's opinion herein, as it seems to me, probable cause to arrest is not necessary where there is reason to suspect that a particular individual is unlawfully carry-

ing a dangerous weapon, or possesses a bomb on an airplane, a nuclear device in the Grand Central Station or in some comparable situation. In my view there is no legal difference between the situation here presented and the situations which confronted the court in *People v. Rivera* (14 NY 2d 441, cert. den. 379 US 978), *People v. Pugach* (15 NY 2d 65, cert. den. 380 US 936), *People v. Peters* (18 NY 2d 238) or *People v. Sibron*, 18 NY 2d 603). In either instance it is suspicion engendered by some circumstance short of constituting probable cause to make an arrest that justifies the invasion of a defendant's person for the discovery of a dangerous weapon. It does not matter whether the suspicion is created by an anonymous telephone call from an unknown informer or the suspicious presence of the defendant in the hall of an apartment house, his behavior in front of a store on the street, or the protrusion of some concealed object in his clothing which proves to be a knife or a revolver. In the *Peters* and *Sibron* cases the writer differed with the court majority only in that it seemed to him that frisking a man's person to discover a revolver, based on suspicion rather than upon probable cause for arrest, could not lead to his arrest and conviction unless what was discovered was a weapon. *Peters* possessed burglar's tools and *Sibron* had heroin in his pocket. I thought that the possibility of immediate danger, to the police officer or to the public, arising from the possession of a dangerous weapon was all that justified invading his person for the discovery of weapons, and that, unless weapons were found upon him, the invasion of his person could not be turned to account by the prosecution to convict him of anything other than illegally carrying a weapon. If the thinking of the majority in *Peters* and *Sibron* or my own more limited construction be followed,

there is no reason on account of which this appellant could not have been adjudged a youthful offender, as he was on his plea of guilty, of attempted felonious possession of a firearm. It is not necessary that there shall have existed probable cause to make an arrest. If there was reasonable basis for suspicion, as arose from the information furnished by an anonymous informer, the police could search him for a weapon which was uncovered when they did so. This was, in my view, tantamount to a frisk. I agree that the judgment and the order denying the suppression of evidence should be affirmed."

There emerges from these opinions the clear pronouncement by the Court of its belief that no constitutional prohibition—and specifically not the Fourth and Fourteenth Amendments—stands in the way of the implementation of the purposes of Section 180-a by a search of the person, provided there exists reasonable suspicion of the present factors of crime and of danger to the officer. The Court of Appeals having thus construed the New York statute, this Court, following its long established practice, will accept that construction and adjudicate the case on that basis. (*Adderly v. Florida*, 87 S. Ct. 242.)

Appellant and amici unite in a chorus of protest and dissent. The refrain of the chorus is that this Court has never sanctioned—indeed, has always prohibited—searches of the person, unauthorized by a warrant, or not incidental to a lawful arrest or not consented to; and that even in these cases both the warrant and the arrest must be based upon probable cause. That which has never been, they say, cannot now be.

It will eliminate needless discussion for us to concede, as we do, that in the case of the *traditional* search, this Court

has from the time of *Boyd v. United States*, 116 U.S. 616, to its latest pronouncement, *Camara v. Municipal Court*, 387 U.S. 523, and in all intermediate cases whether involving a search of the person, (*Henry v. United States*, 361 U.S. 98), or of a moving vehicle, (*Carroll v. United States*, 267 U.S. 132, *Brinegar v. United States*, 338 U.S. 160), or of premises, (*Mapp v. Ohio*, 367 U.S. 643; *Ker v. California*, 374 U.S. 23; *Camara v. Municipal Court*, *supra*), insisted that, absent the authorization of a judicial search warrant or the usually improbable fact of consent, the search must be conducted as an incident to an arrest which is itself lawful because it is based upon probable cause to believe that the defendant has committed or is about to commit a crime. The Court, however has never as yet adjudicated the specific question herein involved. It is our submission that no process of analogical reasoning can lead to the proper determination of the problem. Therefore precedents—the Court's decisions in a field having only an apparent resemblance to the problem of the instant case—are of but minimal use in the solution of the problem.

With all respect to the sincerity and scholarship of our opponents and their prodigious labors, we submit that they have overlooked the pertinent differences which are present in the searches permitted by Section 180-a and the traditional searches upon which they focus their attention.

It is clear, we believe, beyond possibility of obscuring that Section 180-a search is designed solely to protect the officer in the legitimate pursuit of his obligatory duties. On the other hand, the searches prohibited by the Fourth Amendment have always been undertaken for the purpose of discovering that evidence which will ultimately lead to the

conviction of a defendant who at the moment of the search is not only the target of the investigation but is in the "accusatorial stage" which has already brought the public authorities to the decision to arrest him for the purpose of prosecution (*Escobedo v. Illinois*, 378 U.S. 478). At this point the Fourth Amendment (and the Fifth and the Sixth Amendments; *Escobedo v. Illinois, supra*) intervene to prevent the authorities from convicting him through his own mouth or through the invasion of that privacy which the Fourth Amendment guarantees.

As this Court wrote in *Boyd v. United States*, 116 U.S. 616:

"It is not the breaking of his doors and the rummaging of his drawers that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, * * *. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods is within the condemnation * * * [of those Amendments]."

Surely it is a distorting analogy which sees a complete parallel between the two disparate searches.

The purpose for which the exclusionary rule enforced by this Court was fashioned was described in *Elkins v. United States*, 364 U.S. 217. It

"is to deter—to compel respect for the constitutional guarantee in the only effectively available way—by removing the incentive to disregard it."

But when an officer stops and searches a person whom he considers to be dangerous, he does so, not to procure evidence which will lead to ultimate prosecution and conviction, but solely in order to protect himself against a danger reasonably suspected to exist. Therefore, as the Supreme Court of New Jersey pertinently observed in *State v. Dilley* (49 N.J. 460):

"That being so, the evidential exclusion of the weapon he uncovers would in nowise avoid future conduct of similar nature on his part or serve any of the deterrent purposes of *Mapp v. Ohio*."

Nor, we believe, have objectors to stop and search sufficiently considered the probable—and in many instances, the certain—consequences of a destruction of the power to search. One—the numerous deaths of or injuries to, officers—is demonstrated by the statistics of such death and injury to which we refer at pages 25 seq. of this brief and which we show in exhibits. The other—perhaps not so certainly demonstrable by statistics but quite reasonable in assumption—is that the security of the community will be endangered by the unwillingness of officers to risk their own safety under circumstances in which they cannot protect themselves. Police officers, even of the highest type, are but human beings subject to human frailties. It is not to be expected of them as a class that they should risk their lives in the fulfillment of their duties unless they are given the right, at least to minimize the dangers of such risk. The New Jersey Supreme Court wisely observed in *Dilley*, *supra*:

"Freedom and privacy are precious rights which must be zealously guarded for the individual. But without the general security of law and order they

would lose their meaning for all. This was fully recognized in the fourth amendment which balances the rights of the individual and society and embodies the test of reasonableness. While the Supreme Court has gone to great lengths in vindicating the rights of the individual as guaranteed by the amendment, it has done so with stated awareness of the practical needs of 'effective criminal investigation and law enforcement' in the States (Ker v. California, 374 US 23, 34, 10 L. Ed. 2d 726, 738, 1963) and with stated acknowledgment that the validity of particular police action under the amendment will turn on its reasonableness in the light of 'the facts and circumstances of each case' (Cooper v. California, supra, US at , 17 L. Ed. 2d at 732)."

All authorities and all students of the problem agree that the greater the number of unprevented and undiscovered crimes, the greater the increase in subsequent crimes. It is but the part of homely wisdom to realize that criminals are encouraged to continue in criminal practices by society's weakness either in preventing the commission of earlier crimes or in the discovery and punishment of criminals.

We think also that in analogizing and equalizing these disparate searches, our opponents have forgotten the maxim *necessitas facit licitum quod alias non est licitum*. That the necessity for Section 180-a exists is conclusively demonstrated by the facts of contemporary life.

The report of the President's Commission on Law Enforcement and Administration of Justice, entitled "The Challenge of Crime in a Free Society" (United States Government Printing Office, February 1967, p. 18) notes as the statistics for the estimated number and percentage of reported offenses in 1965 alone these truly horrifying figures:

Murder and Non-Violent Manslaughter, 9,850; Forcible Rape, 22,467; Robbery, 118,916; Aggravated Assault, 206,661; Burglary, 1,173,201; Larceny of \$50 or over, 762,352; Motor Vehicle Theft, 486,568; in a total of crimes against the person numbering 357,894 and of property crimes numbering 2,422,121. The same Report (p. 20), dealing with the incident of unreported crime, states that "although the police statistics indicate a lot of crime today, they do not begin to indicate the full amount". In graphs of the most graphic kind, the Report (pp. 22-26) depicts the pronounced rise and increase in crime in the period from 1933 to 1965. The Report draws the conclusion (p. 30) that "most forms of crime—especially crimes against property—are increasing faster than population growth. This means that the risk of victimization to the individual citizen for these crimes is increasing, although it is not possible to ascertain precisely the extent of the increase. All the economic and social factors discussed above support and indeed lead to, this conclusion."

From the many recommendations which the Commission makes we quote those which are notably germane to the issue before the Court:

"The other issue involves the basic police practice of stopping suspects, detaining them for brief questioning on the street and, for the policeman's self-protection, 'frisking' them for weapons. Commission observers of police streetwork in high-crime neighborhoods of some large cities report that 10 percent of those frisked were found to be carrying guns, and another 10 percent were carrying knives. If the police were forbidden to stop persons at the scene of a crime, or in situations that strongly suggest criminality, investigative leads could be lost as persons disappeared into the massive impersonality of an

urban environment. Yet police practice must distinguish carefully between legitimate field interrogations and indiscriminate detention and street searches of persons and vehicles.

The Commission recommends:

State legislatures should enact statutory provisions with respect to the authority of law enforcement officers to stop persons for brief questioning, including specifications of the circumstances and limitations under which stops are permissible.

Such authority would cover situations in which, because of the limited knowledge of a policeman just arriving at the scene, there is not sufficient basis for arrest. Specific limitations on the circumstances of a stop, the length of the questioning, and the grounds for a frisk would prevent the kind of misuse of field interrogation that, the Commission study also indicated, occurs today in a substantial number of street incidents in some cities. As discussed in a later section, such statutes should be implemented by the creation by police administrators of specific guidelines for police action on the street. *A balance between individual rights and society's need for protection from crimes can be struck most properly through this combination of legislative and administrative action. Court review then proceeds under more enlightening circumstances.*

The Commission notes that the U.S. Supreme Court will review this term at least two cases bearing on police authority to stop persons. Of course, any legislation and administrative rules must be consistent with court rulings on this issue." (*Italics ours.*)

The Federal Bureau of Investigation, in its pamphlet "Crime in the United States" as part of the Uniform Crime

Reports for 1966 has equally startling statistics. Thus (p. 1) it notes in capsule form:

"Almost 3¼ million serious crimes reported during 1966; an 11 percent rise over 1965.

Risk of becoming a victim of serious crime increased 10 per cent in 1966 with almost 2 victims per each 100 inhabitants.

Firearms used to commit more than 6,500 murders, and 43,500 aggravated assaults in 1966.

Daytime burglaries of residences rose to 140 percent in 1966 over 1960.

Property worth more than \$1.2 billion lost as a result of 153,400 robberies, 1,370,000 burglaries, 2,790,000 larcenies, and 557,000 auto thefts. Police recoveries, however, reduced this loss by 55 percent.

Arrests for juveniles for serious crimes increased 54 percent in 1966 over 1960, while number of persons in the young age group, 10-17, increased 19 percent.

Arrests for Narcotic Drug Law violations rose 82 percent, 1960-1966. Narcotic arrests 1966 over 1965 up 28 percent influenced primarily by marijuana arrests in Western States.

Police solutions of serious crimes declined 8 percent in 1966.

Fifty-seven law enforcement officers murdered by felons in 1966. Firearms used as murder weapons in 96 percent of police killings since 1960." (Italics ours.)

We also annex as Exhibit "B" and "B2" statistics for the first half of the year 1967.

We annex as Exhibits "A" and "A2" graphs of the vast disproportion of increase in crime as compared to increase in population during the period 1960 to 1966.

The summary of the statistics included in Exhibit "B-2" depicts a picture of crime and violence which justifies its repetition here:

"Crime in the United States as measured by the Crime Index rose 17 percent during the first six months of 1967 over the same period in 1966. The violent crimes as a group increased 18 percent with robbery up 30 percent, murder 20 percent, aggravated assault 11 percent and forcible rape 7 percent. The voluminous property crimes rose 17 percent as a group. Auto thefts registered a 19 percent rise, burglary 18 percent and larceny \$50 and over 16 percent. All cities when grouped according to population had crime increases ranging from an average of 7 percent in cities with over one million population to 23 percent in cities having a population of 500,000 to one million. The suburban areas reported an increase of 18 percent and the rural areas were up 15 percent. Geographically, the upward crime trend was consistent throughout the country. Crime in the North Central States rose 20 percent, 18 percent in the Northeastern States and 16 percent in the Southern and Western States. Murder registered the highest percentage increase in the North Central States while in the Southern, Western and Northeastern States the crime of robbery showed the sharpest increase."

As Exhibits "C2" and "C3" we submit the Bureau's analysis of police killed by felons during the period 1960 to 1966, in a total number of 335 victims. The analysis deals with the nature of the weapons used by the killers, the type of assignment of the police officer and other data which we do not here particularize except that in which the prior criminal records of police killers is thus described:

"Among the 442 persons who were involved in the police killings, 67 percent had prior convictions on criminal charges and 69 percent of this group had been granted leniency in the form of parole or probation on at least one of these prior convictions. *In fact, 3 of every 10 of the murderers were on parole or probation when they murdered a police officer.*" (Italics ours).

Nor is the non-lethal assault upon police officers to be minimized. The Bureau reports that in 1966 (as is shown by Exhibit "C"), officers suffered 23,851 assaults—a percentage of 12.2 per 100 police officers. Of these 9,113 resulted in injury—a percentage of 4.6 per 100 officers.

This is nothing less than war between society and its criminal element.

In his dissenting opinion in *People v. Peters*, 18 N Y 2d 238, Fuld, J. wrote:

"Of course, there are risks inherent in investigatory activities undertaken by the police but, certainly, it does not follow from that that the police are privileged, absent probable cause, to search anyone who looks or acts suspiciously and to use against him any articles they may find on his person. As I previously observed, 'Other methods are available whereby the police may protect themselves while carrying on their investigations, other procedures which, if utilized, will safeguard the police and the community from the criminal minority without destroying the sense of dignity and freedom with which the law-abiding majority walk the streets.' (*People v. Rivera*, 14 NY 2d 441, 452 (dissenting opinion), cert. den. 379 US 978.)"

With great deference to the present Chief Judge of the Court of Appeals, we point out that while he suggests the availability of "other methods" whereby "the police may protect themselves while carrying on their investigations***", he offers no example of such other methods; and we believe that the police would be no more enlightened by this advice than we are. We suggest as much the more realistic the approach of Keating, J. in *Peters*:

"Since the limited detention for the purposes of inquiry was found to be a necessary adjunct to the prevention and discovery of crime, we further recognized that the answer to such an inquiry might be a bullet—in any event the exposure to danger could be very great."

We have so far tabulated but one group of society's victims of the war. We cannot give the statistics for the persons not affiliated with the police who were in one degree or another injured during the perpetration of the crimes shown by the Reports, but we can and do assert that there were such victims: and even one person thus victimized is too much.

In the more grisly classification of "murder victims by age, sex and race, 1966" however, we do annex as Exhibit "D" the Bureau's computation in number, sex and race for that year alone in the total of 9,522 persons.

As one reads the briefs of appellant and *Amici* one might be led to the conclusion that the police are themselves responsible for the deaths and injuries which their forces suffered at the hands of the criminal population. (Even a doctrinaire position cannot lay to the civil victims of the war blame for their deaths and injuries).

Appellant's brief (p. 53) is able to say that "even assuming the forcible, compelled stop is a major weapon in the policeman's arsenal against crime, we submit that the price paid in community alienation is greater than the benefits accruing from its deployment". Quotations by the brief from surveys conducted in several metropolitan areas are deemed to justify the statement (p. 55) that "the conclusion seems inescapable that the asserted gain to law enforcement from use of the 'stop' and most particularly from the use of the forcible, compelled stop coupled with a search, is heavily outweighed by the toll the practice exacts in community-police friction and hostility". We will not debate the point; because to us it seems clear beyond the need for debate that the wounds and deaths shown by factual statistics far outweigh in significance, import and result, the conclusions expressed by the brief which in the last analysis rest only upon opinion.

We do say that if there is resentment among those who are stopped and searched, and found by reason of the search to be amenable to criminal prosecution, their resentment moves us not at all. As to individuals the search of whose person has not been justified by reasonable suspicion—and we of course do not deny that there have been such searches—the answer lies not in the destruction of the right to search, but in better superintendence and implementation of that right (See excerpt from President's Commission report, quoted at page 26 of this Brief). Appellant's brief (p. 55 seq.) is itself not unhopeful of a beneficent result from better police practices in this field. It writes: "The focal point of community resentment is, unfortunately, the police. However, the one bright picture which emerges from the various Crime Commissions field studies is that the ex-

perts in the field recognize this and are attempting to persuade the police to solve this problem." We submit that while police practices in the past may merit criticism for excessive and improper utilization of the right to stop and search, it is entirely unrealistic to discount completely the possibility and perhaps even the probability of improvement in use of the power and, so discounting, to advocate its destruction.

This is, figuratively, to believe that the only way to prepare roast pig is to burn down the barn which is the pig's habitation.*

Our last word on this phase concerns police utilization of stop-and-frisk-or-search power where the power affects a completely innocent person. NAACP *Amicus*, arguing that the power gives the police control over the privacy of *all* citizens and that it should for this reason not be granted to the police (in contrast to the traditional power of individual search upon probable cause only) says (brief, p. 10 seq.): "It is true historically, because the Court is now asked for the first time to legitimate criminal investigative activity that significantly intrudes upon the privacy of individuals who are undifferentiable from Everyman as the probable perpetrators of a crime." We acknowledge the literary quality of the allusion, but we submit that this attractive merit cannot hide the real issue before the Court. Neither Everyman nor any other Pilgrim during his life's Progress in an organized society walks alone. Only in the state of nature envisaged by Rousseau is Everyman—and any man—untouched by the presence of every other man making *his* life's Progress. The very fact of living in an organized society compels some notice of, and adherence to,

* Charles Lamb, "A Dissertation Upon Roast Pig."

the wise principles expressed in the maxim *sic utere tuo ut alienum non laedas*. If it be a price for the citizen to pay in return for the privilege of living in a safe society that he should willingly pause for a few moments in the exercise of his unquestionable right of locomotion in order to answer the reasonable inquiry of an officer, (whose responsibility for the preservation of the public peace is in any event a heavy one, and in all events imposed upon him for the very protection of the citizen being questioned), then it is, we submit, but a slight price to pay in return for that protection. It was well said in *State v. Hatfield*, 112 W.Va. 424, 427:

“A law-abiding citizen cannot have a valid objection to the inconvenience of being stopped, so long as he is accorded courteous treatment.”

Amici and appellant, in addition to contending that “reasonable suspicion” may not constitutionally be substituted for “probable cause,” also contend that reasonable suspicion can in any event not serve the function of probable cause, which is “to protect the ‘liberty of every man’ from subjection to police discretion.” The reason for this inability, according to NAACP *Amicus* (brief, p. 27, seq.) is that reasonable suspicion is not capable of that objectivity which “probable cause” possesses. We submit that the sought-for distinction between the two tests of probable cause and reasonable suspicion is non-existent except in semantic exercise. *Amicus* attributes to “probable cause” an objectivity, even when exercised by the police officer, which the same police officer cannot utilize in arriving at a determination of “reasonable suspicion.” The thought is strikingly expressed (p. 29): “It avoids the

dangerous mysticism of police professional, and professionally motivated, intuition * * *".

We say "strikingly expressed", but at the same time we ask: why cannot the same police officer—who in many instances has been judicially determined to have correctly assessed the facts of a situation into a determination of the existence of "probable cause"—exercise the same faculties of discernment and determination in arriving at a conclusion of the existence of "reasonable suspicion"? We also ask: if this Court has so far trusted the police officer as to authorize his search as an incident to an arrest, the lawfulness of which he has been required to determine for himself, why cannot it not similarly trust him to ascertain whether or not "reasonable suspicion" exists?

Put in another fashion: if this Court has found it constitutionally possible to substitute the officer's judgment for a judicial warrant as the basis for an arrest which is *designed from the moment of arrest to insure the arrestee's prosecution*, why cannot it not with equal constitutional propriety entrust to the same officer the infinitely more limited search which is designed only to effectuate the equally limited purpose of insuring his own safety?

It is moreover not to be forgotten—although appellant and amici appear to have forgotten—that the validity of the search authorized by Section 180-a (*People v. Taggart, supra*) comes under the same careful judicial scrutiny as does the validity of the traditional search. This Court will be engaged in *Peters v. New York*, No. 74, and *Terry v. Ohio*, No. 67, in this very process of scrutinizing the constitutional validity of the searches therein involved.

Many Courts throughout the land are daily engaged in testing the validity of search warrants as well as in deciding the constitutional propriety of searches incidental to arrest. Counsel suggest no objection to this exercise of judicial duty and power. On the contrary, there is a concession that what this Court and other Courts have done in this field arises from a necessity created by the existence of potential fallibility in "probable cause" as a standard.

N.A.A.C.P. *Amicus* (p. 29 seq.), conceding that "probable cause" is not an infallible standard write: "This is not to say that 'probable cause' functions unerringly, or with perfect clarity. Of course, it does not. No standard for the case-by-case determination of the legitimacy of police investigative intrusions could." *Amicus*, however, urges: "But the very failings of 'probable cause' in this regard, together with its relative successes, caution against its abandonment in favor of more arcane, more impressionistic, less objective, less historically developed standards." We answer: except for the fact that because of its lateness of creation the police-safety-search permitted by Section 180-a is "less historically developed" than the traditional search, all of the adjectives used by *Amicus* ("arcane", "more impressionistic", and "less objective") are nothing other than the expression of a point of view. Neither "probable cause" nor "reasonable suspicion" is tangible or physical. Neither can be measured by linear measurement nor weighed quantitatively. Each is a concept: and the value of the concept must be determined by the Court by balancing society's interest in proper measure with individual interest. It is our submission that the analysis by Keating, J. in *People v. Peters*, *supra*, of the differences between the two standards is both realistically perceptive and constitutionally correct:

“Stripped to the barest essentials, ‘probable cause’ requires satisfactory grounds for believing that a crime was committed, while ‘reasonable suspicion’ requires satisfactory grounds for suspecting that a crime was committed. The difference between these two standards is proportionate to the difference in degree of invasion between an arrest and a detention, between a full search and a frisk. Such a difference in standards is both reasonable and desirable.”

So also, we submit, is his reason for concluding that, again both realistically and constitutionally, the Section 180-a search is unexceptional:

“The attempt to apply a single standard of probable cause to all interferences—i.e., to treat a stop as an arrest and a frisk as a search—produces a standard either so strict that reasonable and necessary police work becomes unlawful or so diluted that the individual is not adequately protected. The varying standards now in effect through our decision in *Rivera* and through section 180-a best resolve this problem.”

We have heretofore (p. 21, this brief) paid tribute to the sincerity of purpose and scholarship which informs the briefs of appellant and *amici*; and we are pleased to do so again. Nevertheless, we cannot but express our belief that the conception of the Constitution which they develop forgets that characteristic which has enabled it from the beginning to serve so well the needs and interests of a nation whose physical growth and power is matched only by the complexity of the problems inherent in the changes which the country has undergone from the days of the Colonies to our time. Disregarded is the fact that it is not written in the Constitution, as it is “written among the laws of the Persians and the Medes that it be not altered.”*

* Book of Esther I, 19.

The genius of the Constitution has resided in this very faculty of adaptation to new conditions in order to provide new guides for the exercise of governmental power made necessary by these changes. The Constitution, under the wise guidance of this Court, has solved problems which the Founding Fathers could not possibly have foreseen. It was, we suggest, this very factor of adaptability which led Prime Minister Gladstone to characterize the American Constitution as "The most wonderful work ever struck off at a given time by the brain and purpose of man"*. |

The Fourth Amendment was the response of the Framers to the oppressive acts of King George III, to Writs of Assistance; to searches without warrants and to searches with warrants unrestricted in scope. Nowhere in the wording of the Amendment can there be found power to search save under the authorization of a judicial warrant. Yet this Court has more than once recognized that the Amendment must be construed, not in literal implementation of its words only, but in reasonable and necessary ascertainment of its meaning and purpose in relation to specific situations. The Court has frequently said that the prohibition against searches is not total—that the Amendment does not prohibit all searches. What is prohibited is only unreasonable searches.

This view of the Amendment has enabled the Court to find in it permission for searches incidental to lawful arrest (*Weeks v. United States*, 232 U.S. 388, *United States v. Rabinowitz*, 339 U.S. 56). In *Rabinowitz*, *supra*, the Court, over the vigorous protest of Frankfurter, J. joined in by Jackson, J., extended the power of incidental search

* American Treasury of Quotations, edited by Clifton Fadiman, p. 521.

so as to include not only the person of the arrestee but the place in which the arrest occurred. The Court wrote:

“What is a reasonable search is not to be determined by any fixed formula. The Constitution does not define what are ‘unreasonable’ searches and, regrettably, in our discipline we have no ready litmus-paper test. The recurring questions of the reasonableness of searches must find resolution in the facts and circumstances of each case.”

It is this principle of construction and determination which we now urge upon the Court.

Change in the *mores* of the nation led the Court to sanction a further variant of the concept of reasonable search. In *Carroll v. United States*, 267 U.S. 132, the Court ruled that a search of a moving automobile without a warrant did not offend the Fourth Amendment. Taft, C. J. wisely wrote:

“The 4th Amendment is to be construed in the light of what was deemed as unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens.”

Accord:

Brinegar v. United States, 338 U.S. 160.

We urge the acceptance of the complete analogy which this quotation justifies between the right to search in the traditional case and the right to search created by Section 180-a.

The problem involved in the case at bar is a striking example of the need for adaptability and present change.

In the days of the Founding Fathers the criminal—certainly the violent criminal—was most usually a solitary footpad armed with a stave, a sword or a knife. Certainly he was not armed with the complex revolvers and automatic pistols of our day. Nor did the Framers of the Constitution know of highly organized groups of professional criminals, many in number, murderous in instinct and desperate in violence. They dealt in the Fourth Amendment with the conditions which they knew. We ask that this Court adjudicate the constitutionality of Section 180-a as construed by the New York Court of Appeals according to the needs of our day—needs which our Exhibits establish beyond possibility of effective dispute or denial.

The Court has but recently given evidence of its willingness to construe the Fourth Amendment “in a manner which will conserve public interests as well as the interests and rights of individual citizens” (*Carroll v. United States, supra*). In *Warden, Maryland Penitentiary v. Hayden*, 18 L. Ed. 2d 782, the Court decided that in the course of a permissible search of a residence for a fleeing fugitive, physical evidence of his crime, as differentiated from the instrumentalities and fruit of that crime, were properly and lawfully seized. In so doing it overruled *Gouled v. United States*, 255 U.S. 298, which had long been thought to prohibit a search for “mere evidence”.

In its latest Fourth Amendment decisions (*Camara v. Municipal Court*, and *See v. City of Seattle, supra*) the Court, while prohibiting on Fourth Amendment grounds the wholesale entry by municipal health officers, on routine building inspections, into either homes or business premises unless sanctioned by search warrants, nevertheless did in-

dicade that in an emergency situation it would continue to permit

"... those prompt inspections, even without a warrant that the law has traditionally upheld in emergency situations. See *North American Cold Storage Co. v. City of Chicago*, 211 US 306 (seizure of unwholesome food); *Jacobson v. Massachusetts*, 197 US 11 (compulsory small pox vaccinations); *Compagnie Francaise v. Board of Health*, 186 US 380 (health quarantine); *Kraplin v. Truax*, 119 Ohio St. 610, 165 N.E. 498 (summary destruction of tubercular cattle)."

The whole point of Section 180-a—the genesis of its enactment and the content of its purpose—is that our contemporary society is in a state of emergency created by the continually enormous increase in crime. That there is this condition of emergency does not rest in conjecture or argument. Its existence is proved statistically by the facts and figures we have quoted from the studies of the President's Commission and from the Federal Bureau of Investigation. Its existence, we submit, creates a new era in the history of this country comparable in fundamental significance to some of the other emerging eras during which this Court has adapted various provisions of the Constitution to contemporary facts without impinging upon or detracting from the true meaning and purpose of the Bill of Rights.

In the specific area of Fourth Amendment rights to which Section 180-a is related, we hope that the Court will construe the statute in the spirit noted by Stewart, J. in *Elkins v. United States*, 364 U.S. 206, 222:

"It must always be remembered that what the Constitution forbids is not all searches and seizures, but

unreasonable searches and seizures. Without pausing to analyze individual decisions, it can fairly be said that in applying the Fourth Amendment this Court has seldom shown itself unaware of the practical demands of effective criminal investigation and law enforcement."

He added:

"In any event, while individual cases have sometimes evoked 'fluctuating differences of view', *Abel v. United States*, 362 U.S. 217, 235, 4 L. ed. 2d 668, 684, 80 S. Ct. 683, it can hardly be said that in the overall pattern of Fourth Amendment decisions this Court has been either unrealistic or visionary."

* * * * *

To this point we have sought to express our belief in the constitutional validity of Section 180-a as construed by the Court of Appeals in *People v. Taggart*, *supra*: i.e., as permitting a search rather than only the limited "frisk". We realize, however, that a different assessment of the statute has been made by others. We do not doubt the complete sincerity of the authors of appellant's brief and of those who have prepared the *Amici* briefs. Indeed, there is high judicial support for their views (Fuld, C.J., dissenting in *Rivera*, *supra*, *Pugach*, *supra*, *Peters*, *supra*, the case at bar, and *Taggart*, *supra*).

Therefore, while we entertain the hope that the Court will declare Section 180-a constitutional even in its *Taggart* extent, we must envisage the possibility that the Court will find that the statute thus construed violates the Fourth Amendment. This, however, we believe would not necessitate a complete condemnation of the statute. It is within the powers and practice of this Court in such a situation

to separate the good from the bad, the constitutional from the unconstitutional, and to declare that which is permissible at the same time that it forbids that which is prohibited.

We need not repeat here that which we have said at pages 15 seq. of this brief, nor re-quote those portions of the opinion of Bergan, J. in *Rivera, supra*. We submit them, and particularly Judge Bergan's opinion, as having with complete adequacy demonstrated that if Section 180-a is limited so as to confer upon the police the power to stop and frisk in the proper factual situations of criminal activity and danger to the officer, the statute is entirely constitutional in the context of the Fourth Amendment.

We treat now, also, the limitation on the constitutional utilization of the statute as proposed in the concurring opinion of Van Voohis, J. in *Taggart, supra*. While he concurred in the Court's decision that the statute constitutionally authorized not only a frisk, but a search of the person, he wrote:

"In the Peters and Sibron cases the writer differed with the court majority only in that it seemed to him that frisking a man's person to discover a revolver, based on suspicion rather than upon probable cause for arrest, could not lead to his arrest and conviction unless what was discovered was a weapon. Peters possessed burglar's tools and Sibron had heroin in his pocket. I thought that the possibility of immediate danger, to the police officer or to the public, arising from the possession of a dangerous weapon was all that justified invading his person for the discovery of weapons, and that, unless weapons were found upon him, the invasion of his person could not be turned to account by the prosecution to convict him of anything other than illegally carrying a weapon."

In his dissenting opinion in the case at bar, he had written (18 N Y 2d 603, 606):

"If a frisk reveals a weapon, which is the only purpose for which frisking is authorized, then it should be confiscated and be evidence against the accused on a charge of unlawfully possessing or concealing a weapon or in any other criminal context in which the possession of a weapon is a factor. If we go beyond that, then frisking a suspect, which can be done in practice (though not in theory) at the officer's whim, will become a pretext for the general search of the person, without probable cause, which the Fourteenth Amendment was designed to prevent. The power to frisk is an exception to the probable cause rule in search and seizure, and is not a search at all except for the discovery of a dangerous weapon concealed upon the person. There it should end, for all purposes. The protection thereby afforded to a policeman, and to bystanders if a shooting duel ensues, is so manifestly called for as a matter of common sense that the benefits to be derived should not be foregone by bending this wholesome device to a different and unintended purpose and by so doing subtly to subvert an important part of the Fourth Amendment."

That is, he would limit the prosecution purpose of the statute to the weapon, for protection against which the search is authorized.

With great deference to Judge VanVoorhis, we submit that this Court should not, in its delineation of the permissible utilization of Section 180-a, impose this limitation. If, by way of either search or frisk, the officer constitutionally discovers any other contraband the possession of which is criminal, the possessor should not be immune to prosecution. It is settled law that in those cases in which a traditional search is made, whatever contraband is thereby dis-

closed is useable in prosecution for its possession even though it was not described in the warrant or related to the crime for which the possessor was arrested. In *Harris v. United States*, 331 U.S. 145. The Court wrote:

"In keeping the draft cards in his custody petitioner was guilty of a serious and continuing offense against the laws of the United States. A crime was thus being committed in the very presence of the agents conducting the search. Nothing in the decisions of this Court gives support to the suggestion that under such circumstances the law-enforcement officials must impotently stand aside and refrain from seizing such contraband material. *If entry upon the premises be authorized and the search which follows be valid, there is nothing in the Fourth Amendment which inhibits the seizure by law-enforcement agents of government property the possession of which is a crime, even though the officers are not aware that such property is on the premises when the search is initiated.*"
(Italics Ours)

That the frisk—or search—which the officer makes under the aegis of Section 180-a has the more limited purpose of self-protection rather than the traditional purpose of prosecution should not be a shield for the wrong-doer. Since he cannot complain of an unlawful invasion of his privacy, he should be held responsible for the consequences of his infraction of the law. The exclusionary rule through which this Court has achieved the enforcement of the Fourth Amendment is grounded upon an underlying constitutional infraction. It should follow that if the infraction is absent, exclusion should not result. It would be an anomalous situation indeed if the wrong-doer were permitted to hide successfully behind the fact of his own wrong-doing.

In sum, if this Court decides that Section 180-a permits a search, or, if not a search, a frisk, the criminal product of the officer's discovery should be available to the State for prosecution based upon possession.

POINT II

The judgment of conviction should be reversed.

Appellant contends that even if the Court declares Section 180-a to be constitutional, the facts of the case did not authorize the search of his person. Therefore, the original order which denied his motion to suppress was erroneous as a matter of law, resulting in a constitutional taint of the judgment of conviction (even though based upon a plea of guilty) which vitiates it.

We agree.

Appellant's arrest cannot be justified by the existence of probable cause to believe that he was guilty of the commission of crime. The eight or more hours during which the officer observed his contacts with known addicts on the street and in the restaurant garnered for the officer nothing but the fact of those contacts. But addicts do not, because of their addiction, forfeit the right to move about freely; nor are they bereft of the right to speak with anyone, so long as their movements and their speech are not in themselves elements of crime. In turn, anyone may lawfully speak to them. Therefore we repeat, until the moment when the officer actually discovered the heroin in appellant's pocket, no cause existed for his arrest for any crime.

That arrest can be justified, if at all, only on the basis of a legal utilization of the power granted the officer by Sec-

tion 180-a. That power, however, could have been lawfully exercised only if there existed the two conditions precedent which the statute requires. We believe that both were absent. Just as appellant could not have been arrested merely because he talked to known addicts, so he could neither be frisked nor searched because these contacts did not in law create a reasonable suspicion of the past, present or imminent commission of crime. This alone should have rendered his entry into appellant's pocket illegal, even if he otherwise reasonably suspected danger to his life or limb. In our view, however, the record of the suppression hearing (see pp. 4-5 of this brief) is insufficient to establish the reasonableness of such suspicion. (We need not, therefore, develop more fully our belief that he did not even entertain this belief.)

There is a third reason which impels us to our position. We have (this brief, pp. 16-18) quoted the reasoning of Breitel, J. by which he arrived at the conclusion that Section 180-a constitutionally authorizes a search of the person. We requote that portion which is here pertinent:

"Needless to add, the serious problem is suggested only in cases involving serious personal injury or grave irreparable property damage and not by the problems associated with the enforcement of sumptuary laws, such as gambling, and laws of limited public consequence, such as narcotics violations, prostitution, larcenies of the ordinary kind, and the like."

We read this to mean that if the officer's suspicion concerning the commission of crime is a suspicion that the crime is possession of narcotics, he may not stop, he may not inquire, and certainly he may not either "frisk" or search. (If he does none of these things, then of course he will not

be in danger). It is true that the Court of Appeals suggested none of these limitations in any of the cases which preceded *Taggart* into the Court. Specifically, it did not impose the limitation in the instant case, which was decided on July 7, 1966. *Taggart* was decided exactly one year later, July 7, 1967. It is our belief that if the time of decision had been reversed, and if this case had followed *Taggart* after the announcement of the *Taggart* limitation, it would have been reversed by the Court of Appeals. We regret that we must take a position contrary to that of the majority of the highest Court of our own State. Our duty, however, compels us to do so.

We refer to our previous position in the New York Courts. In the Appellate Term we assumed the constitutionality of Section 180-a. Even so, we suggested to the Court that "if the Court finds in this case that there was somewhat less than the requisite element of probable cause present in the officer's search of the defendant, and if the Court also determines that the officer was not operating pursuant to Section 180-a of the Code of Criminal Procedure, that the Court remand back to the original Trial Court in order that further determinations might be made with regard to probable cause." This course of action the Appellate Term did not follow, but without opinion affirmed the judgment of conviction and the underlying order denying suppression. In the Court of Appeals the People's brief contained the statement: "The People take the same position in this Court with regard to the issue of probable cause that they took in the intermediate Appellate Court." But, limiting the phrase "probable cause" to its traditional meaning, the brief justified the search under the provisions of Section 180-a as it had been construed by the Court of Appeals prior to *Taggart*.

For the reasons which we have heretofore expressed, we believe and concede that both in the Appellate Term and in the Court of Appeals the People should have confessed error and consented to a reversal of the underlying order denying suppression and of the judgment itself.

CONCLUSION

Code Crim. Pro. Section 180-a should be declared to be constitutional to the extent that, given the presence of reasonable suspicion of the past, present or immediately prospective commission of crime and also of reasonable suspicion of danger to the peace officer's life or limb, he may stop and search the person. If the search discloses possession of a weapon "or any other thing the possession of which may constitute a crime" that weapon or thing may be used as the basis for prosecution.

In the alternative, and if the Court decides that a search is not constitutionally permissible, but that a "frisk" of the person is, then the weapon or "thing" disclosed by the "frisk" may be similarly used.

However, the judgment of conviction should be reversed and the complaint dismissed.

Dated: Brooklyn, New York,
October 1967.

Respectfully submitted,

AARON E. KOOTA
District Attorney
Kings County

WILLIAM I. SIEGEL
Assistant District Attorney
Of Counsel

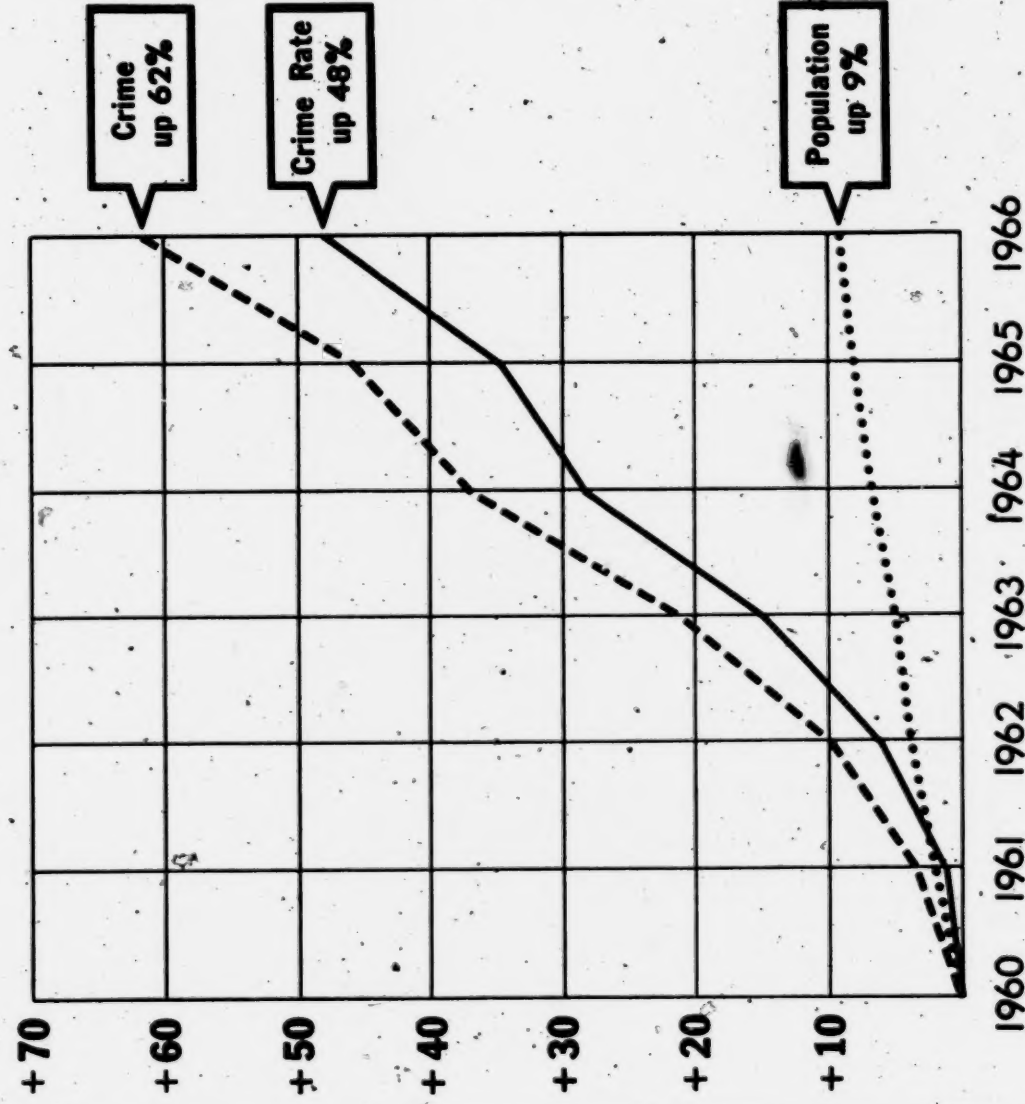
EXHIBIT "A"-1

Chart 1

CRIME AND POPULATION

1960-1966

PERCENT CHANGE OVER 1960

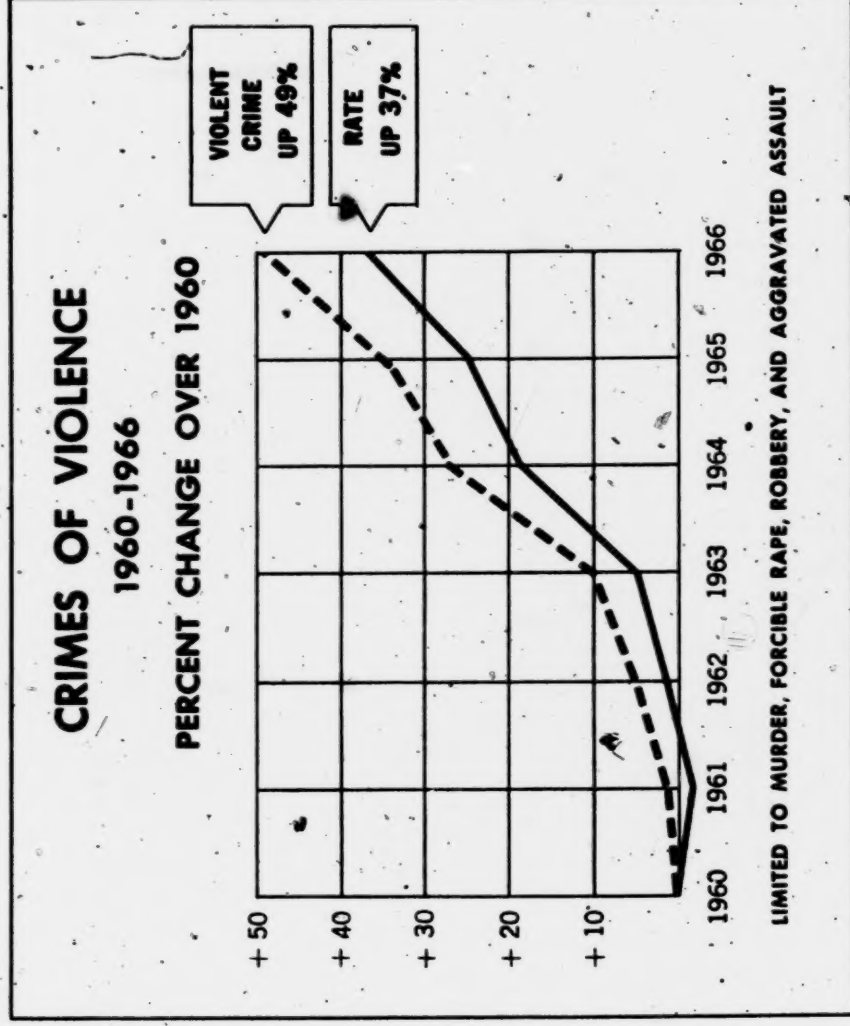


CRIME = INDEX OF CRIME OFFENSES
CRIME RATE = NUMBER OF OFFENSES PER 100,000 POPULATION

FBI CHART

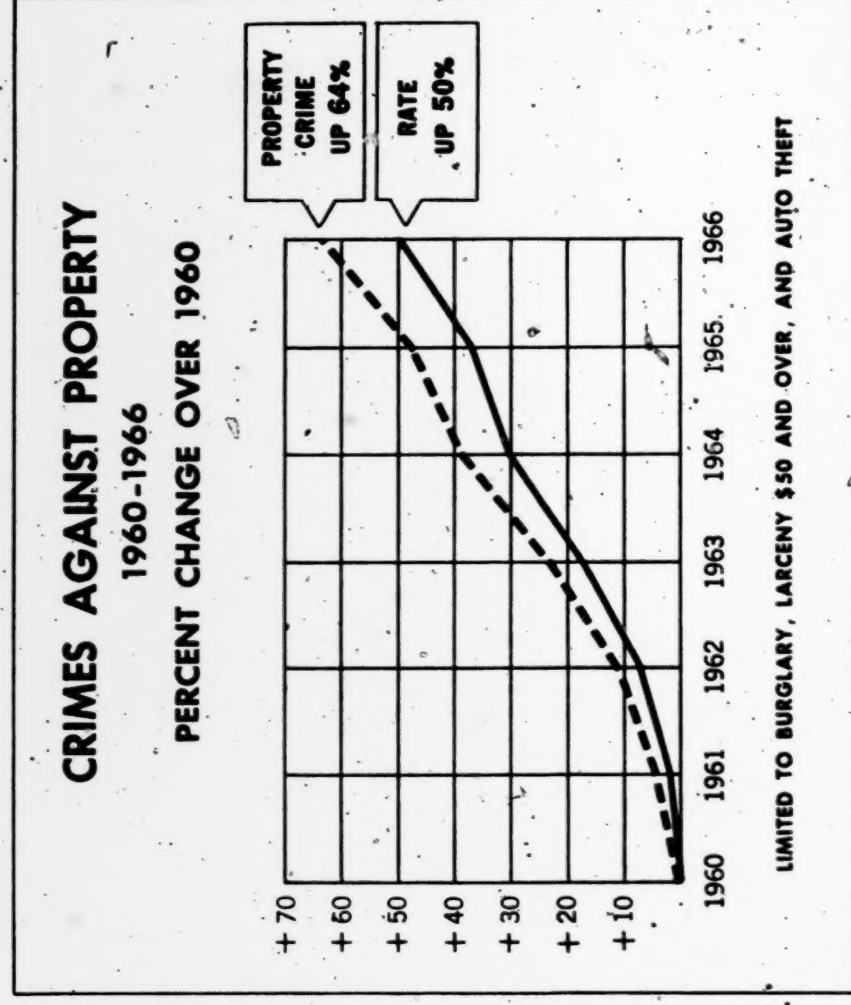
EXHIBIT "A" -

Chart 2



FBI CHART

Chart 3



FBI CHART

FOR RELEASE
FRIDAY AM
SEPTEMBER 15, 1967

UNIFORM CRIME REPORTING
(January - June, 1967)

EXHIBIT "13-1"

Crime in the United States as measured by the Crime Index rose 17 percent during the first six months of 1967 over the same period in 1966. The violent crimes as a group increased 18 percent with robbery up 30 percent, murder 20 percent, aggravated assault 11 percent and forcible rape 7 percent. The voluminous property crimes rose 17 percent as a group. Auto theft registered a 19 percent rise, burglary 18 percent and larceny \$50 and over 16 percent. All cities when grouped according to population had crime increases ranging from an average of 7 percent in cities with over one million population to 23 percent in cities having a population of 750,000 to one million. The suburban areas reported an increase of 18 percent and the rural areas were up 15 percent. Geographically, the upward crime trend was consistent throughout the country. Crime in the North Central States rose 20 percent, 18 percent in the Northeastern States and 16 percent in the Southern and Western States. Murder registered the highest percentage increase in the North Central States while in the Southern, Western and Northeastern States the crime of robbery showed the sharpest increase.

Table 1

CRIME INDEX TRENDS

(January - June, percent change 1967 over 1966, offenses known to the police)

Population Group and Area	Number of Agencies	Population	Total	Murder	Forcible rape	Robbery	Aggravated assault	Burglary	Larceny \$50 and over	Auto theft
Total all agencies	4,635	142,749,000	+17	+20	+7	+30	+11	+18	+16	+19
Total cities over 25,000	804	75,084,000	+17	+25	+9	+30	+10	+17	+15	+19
Suburban area	1,727	45,107,000	+18	+13	+9	+33	+12	+18	+17	+19
Rural area	1,054	20,902,000	+15	+2	+4	+22	+14	+19	+11	+3
Over 1,000,000	4	9,605,000	+7	+30	+6	+17	+6	+6	+7	+3
500,000 to 1,000,000	20	12,540,000	+23	+33	+4	+40	+11	+20	+17	+31
250,000 to 500,000	25	8,722,000	+22	+20	+24	+41	+22	+19	+24	+23
100,000 to 250,000	95	13,706,000	+21	+22	+4	+34	+9	+22	+17	+27
50,000 to 100,000	217	15,089,000	+15	+25	+15	+27	+8	+18	+11	+16
25,000 to 50,000	443	15,422,000	+16	+9	+19	+33	+14	+18	+16	+11
10,000 to 25,000	918	14,362,000	+17	+13	+14	+40	+10	+17	+18	+19
Under 10,000	1,605	8,944,000	+18	+23	+18	+34	+19	+19	+18	+14

Table 2
Crime Index Trends by Geographic Region
(January - June, 1967 over 1966)

Region	Total	Murder	Forcible rape	Robbery	Aggravated assault	Burglary	Larceny \$50 and over	Auto theft
Northeastern States	+18	+25	+8	+28	+14	+18	+10	+26
North Central States	+20	+36	+4	+25	+15	+21	+19	+19
Southern States	+16	+13	+11	+36	+9	+16	+13	+21
Western States	+16	+15	+6	+33	+8	+17	+18	+10

The nationwide rise in aggravated assault included a 24 percent increase in the use of a firearm in these attacks. Armed robbery which comprises 58 percent of the robbery offenses increased 37 percent during the six-month period. Street robbery was up 24 percent, robbery of business houses 39 percent, service station robbery up 30 percent, chain stores 48 percent and robbery of residences 12 percent. Bank robbery which makes up 1 percent of all robbery showed a 57 percent increase during the six-month period. In the larceny classification purse-snatching showed a 26 percent increase and theft of personal property from automobiles was up 18 percent. Burglary of residences during the six-month period increased 15 percent over 1966, while non-residence burglary was up 20 percent.

Issued by John Edgar Hoover, Director, Federal Bureau of Investigation

United States Department of Justice, Washington, D. C. 20535

Advisory: Committee on Uniform Crime Records, International Association of Chiefs of Police

Exhibit "15-4"

Exhibit "15-4"

Exhibit "15-4"

Exhibit "15-4"

Exhibit "15-4"

POLICE KILLED BY FELONS

BY TYPE OF POLICE ACTIVITY

1960--1966

RESPONDING TO "DISTURBANCE" CALLS
(Family quarrels, man with gun, etc.)

71
21%

BURGLARIES IN PROGRESS, OR
PURSUING BURGLARY SUSPECTS

34
10%

ROBBERIES IN PROGRESS, OR PURSUING
ROBBERY SUSPECTS

64
19%

ATTEMPTING OTHER ARRESTS AND
TRANSPORTING PRISONERS

105
31%

INVESTIGATING SUSPICIOUS PERSONS
AND CIRCUMSTANCES

41
12%

BERSERK OR DERANGED PERSONS
(No warning - unprovoked attack)

20
6%

335 POLICE KILLED

INCLUDES CITY, COUNTY, AND STATE POLICE

FBI CHA

Police Killed by Geographic Region and Type of Activity, 1960-1966

	North- eastern States	North Central States	Southern States	Western States	Total	
					Number	Percent
1. Responding to "disturbance" calls (family quarrels, man with gun, etc.)	13	21	28	9	71	
2. Burglaries in progress or pursuing burglary suspects	4	8	14	8	34	
Robberies in progress or pursuing robbery suspects	16	17	16	15	64	
Attempting other arrests and transporting prisoners	10	13	67	15	105	
Investigating suspicious persons and circumstances	4	10	17	10	41	
Berserk or deranged person (no warning-unprovoked attack)	6	2	8	4	20	
Total	53	71	151	60	335	

Because of rounding, the percentages may not add to total.

Police Killed by Felons, 1960-1966 EXHIBIT "C-2"

	Two-man cars	One-man cars		Foot	Detective and special assignment	Off duty	Total
		Alone	Assisted				
1. Responding to "disturbance" calls.....	31	11	9	4	12	4	71
2. Burglaries in progress or pursuing burglary suspects.....	12	13	1	1	7	0	34
3. Robberies in progress or pursuing robbery suspects.....	13	13	5	0	14	11	64
4. Attempting other arrests and transporting prisoners.....	27	36	8	6	23	5	105
5. Investigating suspicious persons and circumstances.....	9	21	1	3	6	1	41
6. Berserk or deranged person (no warning-unprovoked attack).....	5	3	1	5	2	4	20
Total.....	97	99	25	25	64	25	335

*60 city police officers, 39 county and state police officers.

Table 51.—Assaults on Police Officers, 1966, by Geographic Divisions and Population Groups
(4,648 agencies; 1966 estimated population 128,611,000)

Geographic division	Total assaults	Rate per 100 police officers	Assaults with injury	Rate per 100 police officers	Population group	Total assaults	Rate per 100 police officers	Assaults with injury	Rate per 100 police officers
TOTAL	23,881	12.2	9,113	4.6	TOTAL	23,881	12.2	9,113	4.6
New England	1,495	10.6	675	4.8	Group I (Over 250,000)	10,261	12.2	3,747	4.5
Middle Atlantic	6,725	10.5	2,152	3.3	Group II (100,000 to 250,000)	2,989	16.7	1,147	0.4
East North Central	4,294	10.9	1,695	4.3	Group III (50,000 to 100,000)	2,598	13.1	1,060	5.3
West North Central	1,355	10.2	683	5.2	Group IV (25,000 to 50,000)	2,673	13.8	1,183	6.1
South Atlantic	3,930	18.8	1,442	7.1	Group V (10,000 to 25,000)	2,389	12.3	868	4.5
East South Central	1,111	19.1	314	5.4	Group VI (Under 10,000)	1,311	9.9	476	3.0
West South Central	1,272	10.0	575	4.5	Suburban agencies ¹	4,368	10.0	1,557	4.2
Mountain	973	14.1	344	6.3	Sheriffs	1,640	7.3	642	2.9
Pacific	2,514	14.3	1,233	6.3					

¹ Agencies and population represented in suburban area are also included in other city groups.

Table 21.—Murder Victims by Age, Sex, and Race, 1966 EXHIBIT "I"

Age	Number	Percent	Sex		Race					
			Male	Female	White	Negro	Indian	Chinese	Japanese	All others (includes race unknown)
TOTAL	9,552	100.0	7,113	2,439	4,397	5,119	65	7	12	42
Percent			74.5	25.5	45.1	53.6	.7	.1	.1	.4
Infant (under 1)	109	1.1	80	49	73	33	0	0	1	2
1-4	201	2.1	104	97	137	60	0	0	2	2
5-9	98	1.0	52	46	69	28	0	0	1	0
10-14	116	1.2	62	54	72	44	0	0	0	0
15-19	740	7.7	572	168	320	414	4	0	0	2
20-24	1,243	13.0	962	281	462	772	4	1	1	3
25-29	1,159	12.1	882	277	483	664	8	2	2	0
30-34	1,079	11.3	804	275	394	670	10	1	1	3
35-39	1,150	12.0	867	283	431	707	8	0	2	2
40-44	981	10.3	749	232	393	578	7	1	1	1
45-49	736	7.7	503	173	348	375	10	0	1	2
50-54	569	6.0	431	138	302	263	4	0	0	0
55-59	427	4.5	331	96	258	193	1	0	0	5
60-64	300	3.1	235	65	183	115	0	0	0	2
65-69	201	2.1	152	49	126	71	2	1	0	1
70-74	128	1.3	75	53	96	30	.1	0	0	2
75 and over	152	1.6	85	67	115	34	2	1	0	0
Unknown	163	1.7	127	36	46	98	4	0	0	15

1 Because of rounding the percentages may not add to total.

Supreme Court of the United States

OCTOBER TERM 1967

No. 63

NELSON SIBRON,

against

STATE OF NEW YORK.

ON APPEAL FROM THE COURT OF APPEALS OF THE
STATE OF NEW YORK

No. 74

JOHN FRANCIS PETERS,

against

STATE OF NEW YORK.

ON APPEAL FROM THE COURT OF APPEALS OF THE
STATE OF NEW YORK

No. 67

JOHN W. TERRY,

against

STATE OF OHIO.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF OHIO

**BRIEF OF ATTORNEY GENERAL OF THE STATE
OF NEW YORK AS AMICUS CURIAE IN
SUPPORT OF APPELLEES**

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U.S. Supreme Court, U.S.
FILED
OCT 30 1967

JOHN F. DAVIS, CLERK

Appellant,

Appellant,

Petitioner,

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ON APPEAL FROM THE COURT OF APPEALS OF THE
STATE OF NEW YORK

No. 67

JOHN W. TERRY,
against
STATE OF OHIO.

Petitioner,

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF OHIO

**BRIEF OF ATTORNEY GENERAL OF THE STATE
OF NEW YORK AS AMICUS CURIAE IN
SUPPORT OF APPELLEES**

Statement of Interest of Amicus State of New York

The instant cases, which will be heard together by this Court, all involve the constitutionality of questioning and limited protective searches for weapons by police officers who have reasonable ground to suspect that a felony has been committed or is about to be committed. These questions are of direct and substantial interest to the Attorney General of the State of New York. As the chief legal officer of the State (N. Y. Executive Law § 63), charged with the defense of the enactments of our State Legislature (Executive Law § 71), the Attorney General is concerned with maintaining an equitable balance between effective law enforcement to protect society against crime and the observance of procedural due process in the administration of criminal justice.

Section 180-a of the New York Code of Criminal Procedure, codifying the common law, establishes standards defining the circumstances under which citizens abroad in a public place may be questioned as to their activities. These standards serve the valid dual purpose of protecting the individual from being formally charged with crime without prior opportunity to explain his actions, and of permitting the prevention of crime before its commission. The statute permits a "frisk" for weapons only where the police officer not only has facts upon which to base a reasonable suspicion that a felony has or will be committed, but further facts upon which to base a reasonable suspicion that he may be attacked with a dangerous weapon.

We agree with and endorse fully the position taken by the District Attorneys filing briefs with respect to their defense of the New York Statute.

Questions Presented

1. Whether § 180-a of the New York Code of Criminal Procedure violates the Fourth and Fourteenth Amendments of the United States Constitution because it authorizes a police officer to stop a person whom he reasonable suspects is committing or is about to commit a felony and ask him for his name, address and an explanation of his actions.

2. Whether § 180-a of the New York Code of Criminal Procedure violates the Fourth and Fourteenth Amendments of the United States Constitution because it authorizes a police officer who has reasonable grounds to suspect that a felony has been or will be committed, to conduct a limited search of a person only where there are reasonable grounds to suspect that such person may threaten the officer with a dangerous weapon.

3. Whether § 180-a of the New York Code of Criminal Procedure is constitutional on its face, but was improperly applied to the cases of *John F. Peters v. State of New York*, and *Nelson Sibron v. State of New York*.

4. Whether a State court judgment permitting a police officer pursuant to common law to question persons reasonably suspected to be committing a felony or about to commit a felony and to conduct a limited search for weapons, evidence found being inadmissible in a subsequent criminal proceeding, violates the Fourth and Fourteenth Amendments of the United States Constitution.

Summary of Argument

I. Section 180-a of the New York Code of Criminal Procedure codifies the common law right of a police officer to question any individual in a public place where there is a reasonable suspicion that a crime has been committed or is about to be committed. *People v. Rivera*, 14 N. Y. 2d

441 (1964). This power to question is a necessary element in crime prevention; without it, investigative leads would be irreparably lost and emergency situations could not be properly handled.

The state and federal cases upholding this right under common law or statute make clear that a brief inquiry cannot be equated with an arrest. *Wilson v. Porter*, 361 F. 2d 412, 414 (9th Cir. 1966); *United States v. Vita*, 294 F. 2d 524 (2d Cir. 1961); *United States v. Bonanno*, 180 F. Supp. 71, 78 (S.D.N.Y. 1960), reversed on other grounds 285 F. 2d 524 (2d Cir. 1961); *People v. Rivera, supra*; *Cornish v. State*, 215 Md. 64, 137 A. 2d 170 (1957). Arrest, which requires an officer to have probable cause to believe a crime has been committed, necessarily entails being taken into custody to answer for a crime, with the charges permanently entered on police records. *Cannon v. State*, 50 Del. 284, 168 A. 2d 108 (1961).

A brief detention of a suspicious person enables the officer to evaluate the situation and in turn enables the individual detained to explain his actions without the embarrassment, inconvenience and expense of being formally charged with crime. *United States v. Thomas*, 250 F. Supp. 771 (S.D.N.Y. 1966); *United States v. Vita, supra*; *Cannon v. State, supra*; *Kavanagh v. Stenhouse*, 98 R. I. 252, 174 A. 2d 560 (1961).

II: A limited protective "frisk" of a suspect is permitted under Section 180-a only where there are facts upon which to base a reasonable suspicion that the person being questioned is armed and may use his weapon. The regulations issued by the New York State Combined Council of Law Enforcement Officials in connection with the statute specifically provide: "Not everyone may be searched; searches are only permitted when the officer reasonably suspects he is in danger."

Such a protective search, based upon self-preservation, cannot be unreasonable and thus cannot violate the stric-

tures of the Fourth Amendment. Cf. *United States v. Rabinowitz*, 339 U. S. 56 (1950); *Elkins v. United States*, 364 U. S. 206 (1959); *Carroll v. United States*, 267 U. S. 132, 147 (1924).

III. Since a precautionary search for weapons is valid, evidence obtained pursuant to it can be admitted in a criminal prosecution. *People v. Rivera, supra*; *People v. One 1958 Chevrolet*, 5 Cal. Repr. 128, 133 (2d District, 1960). *Mapp v. Ohio*, 367 U. S. 643 (1961) is inapposite, since it is based upon the rationale that if evidence could be freely used regardless of how it was found, police officers might be encouraged to use unlawful crime detection methods. As to the instant statute, however, an officer who reasonably fears danger should not and cannot be deterred from "frisking" a suspect. Abuses of the right to conduct protective searches pursuant to "reasonable suspicion" can be checked by the courts in the same manner as abuses by officers claiming "probable cause" to believe a crime has been committed.

IV. However, assuming *arguendo*, that this Court should regard admission of evidence found in such limited searches as violative of the Fourth Amendment, it is respectfully submitted that the stop and defensive "frisk" authorized by Section 180-a should still be approved and upheld. Defensive searches are qualitatively different from any other kind of search, since they do not seek evidence of crime. They are merely a necessary adjunct to the well-established right to make inquiry pursuant to reasonable suspicion. Since this is a relatively new statutory conception, this Court could permit the reasonable limited search but fashion an appropriate rule concerning admissibility of evidence. This approach has been taken by the Court of Appeals in *State of Ohio v. Terry*, 5 Ohio App. 2d 122, 214 N. E. 2d 114 (1966).

POINT I

A police officer's power to question any person whom he reasonably suspects has committed or is about to commit a felony, has already been established as valid under State and Federal Law, and brief detention pursuant to this power is not an arrest.

As stated by the President's Commission on Law Enforcement and Administration of Justice in its Task Force Report on The Police (U. S. Government Printing Office, 1967), at page 1:

"The heart of the police effort against crime is patrol—moving on foot or by vehicle around an assigned area, stopping to check buildings, to survey possible incidents, to question suspicious persons or simply to converse with residents who may provide intelligence as to occurrences in the neighborhood."

"This common law right to question—in response to suspicious circumstances which may not be sufficient to create probable cause to believe that a crime has been committed—has been codified in Section 180-a of the New York Code of Criminal Procedure.

The legislative history of the statute indicates its dual function of facilitating reasonable crime prevention methods and protecting the individual:

"Legalizing the questioning and searching of a suspect so that it does not constitute an arrest is to the advantage of both the police and the public. When an officer stops a person and questions him, he is often in doubt whether such acts constitute an arrest. If they do the officer is subjecting himself and his employer to the possibility of a suit for false arrest. Whenever an innocent person is arrested, charged with a crime, and brought before a magistrate, his reputa-

tion is harmed, he is humiliated, greatly inconvenienced and put to considerable expense." N. Y. State Legislative Annual, 1964, A. I. 1859, Pr. 3025, page 67, Volker.

The rationale supporting police authority to question and investigate was clearly set out by the New York Court of Appeals in *People v. Rivera*, 14 N. Y. 2d 441, 444 (1964):

"The authority of the police to stop defendant and question him in the circumstances shown is perfectly clear. The business of the police is to prevent crime if they can. Prompt inquiry into suspicious or unusual street action is an indispensable police power in the orderly government of large urban communities. It is a prime function of city police to be alert to things going on in the streets . . . If they were denied the right of such summary inquiry, a normal power and a necessary duty would be closed off."

It is not difficult to conceive of examples illustrating the urgent necessity for the power to inquire, even in circumstances where probable cause for arrest may not exist. If a police officer heard shots coming from a certain street and saw a man running from that direction, no reasonable person could doubt that it would be the officer's duty to stop the person running and determine his identity and the reason for his actions, rather than allow him to disappear. Or, if an anonymous telephone call warned a detective that a man with a red jacket would be setting off a bomb in a certain school, it would be the detective's obligation to question a man fitting the description seen on the school's premises.

This kind of emergency situation was incisively analyzed by the American Law Institute in "A Model Code of Pre-Arrestment Procedure, Tentative Draft No. 1" 1965, pp. 96-97 [President's Commission on Law Enforcement

and Administration of Justice in its Task Force Report on The Police (U. S. Government Printing Office, 1967), at p. 184]:

"If, as some have argued, the only power to restrain a person, even briefly, is by arresting him on reasonable grounds to believe him guilty of a crime, the police will be foreclosed from responding to confused emergency situations in the way that seems most natural and rational. For in such circumstances, where a crime may have been committed and a suspect or important witness is about to disappear, it seems irrational to deprive the officer of the opportunity to 'freeze' the situation for a short time, so that he may make inquiry and arrive at a considered judgment about further action to be taken. To deny the police such a power would be too high a price in effective policing and in the police's respect for the good sense of the rules that govern them, in order to avoid brief inconvenience that most innocent persons would be prepared to undergo."

And as was observed by the President's Commission on Law Enforcement and Administration of Justice in its Task Force Report: Crime and Its Impact—An Assessment (U. S. Government Printing Office, 1967) at p. 94:

"If the police were forbidden to stop persons at the scene of a crime, or in situations that strongly suggest criminality, investigative leads could be lost as persons disappeared into the massive impersonality of an urban environment."

Some States have established by statute the right of police officers to stop and question suspects for a reasonable time. General Laws of Rhode Island § 12-7-1 (1956); New Hampshire Revised Statutes, Ch. 594, § 2 (1955); Delaware Code, § 1902 (1953); Massachusetts General Laws, Ch. 41, § 98 (1961).

Case law also supports a common law as well as a statutory right to question upon reasonable suspicion. See *People v. Rivera, supra*; *People v. Martin*, 46 Cal. 2d 106, 293 P. 2d 52 (1956); *People v. Jones*, 176 Cal. App. 2d 265, 1 Cal. R. 210 (1959); *People v. Faginkrantz*, 21 Ill. 2d 75, 171 N. E. 2d 5 (1961); *State ex rel. Branchand v. Hedman*, 269 Minn. 375, 130 N. W. 2d 628 (1964); *State v. Hope*, 85 N. J. Super. 551, 205 A. 2d 457 (A. D. 1964); *State v. Bell* 89 N. J. Super. 437, 215 A. 2d 369 (A. D. 1965); *People v. Hennerman*, 367 Ill. 151, 10 N. E. 2d 649 (1937); *Huebner v. State*, 33 Wisc. 2d 505, 147 N. W. 2d 646 (1967); *Cornish v. State*, 215 Md. 64, 137 A. 2d 170 (1957); *Commonwealth v. Hicks*, 209 Pa. Super. 1, 223 A. 2d 873 (1966); *Goss v. State*, — Alaska —, 390 P. 2d 220 (1964), cert. denied 379 U. S. 859 (1964); *City of Portland v. Goodwin*, 187 Ore. 409, 210 P. 2d 577 (1949); *State v. Freeland*, 255 Ia. 1334, 125 N. W. 2d 825 (1964); *State v. Harris*, 265 Minn. 260, 121 N. W. 2d 327 (1963); *City of South Euclid v. DiFranco*, 33 Ohio Op. 2d 215, 206 N. E. 2d 432 (Mun. Ct., S. Euclid, Ohio, 1965); *State v. Hatfield*, 112 W. Va. 424, 164 S. E. 518 (1932); *Commonwealth v. Roy*, 349 Mass. 224, 207 N. E. 2d 284 (Sup. Ct., Norfolk, Mass., 1965); *State v. Moore*, — Del. —, 187 A. 2d 807 (Superior Court, Del., 1963); *De Salvatore v. State*, 52 Del. 550, 163 A. 2d 244 (1960); *State v. Chronister*, — Okla. —, 353 P. 2d 493 (1960); *Commonwealth v. Lehan*, 347 Mass. 197, 196 N. E. 2d 840 (1964); *Kavanagh v. Stenhouse*, 93 R. I. 252, 174 A. 2d 560 (1961); *People v. Beasley*, — Cal. App. 2d —, 58 Cal. Repor. 485 (1967); *State v. Dilley*, 49 N. J. 460, 231 A. 2d 353 (1967); *Wendelboe v. Jacobson*, 10 Utah 2d 344, 353 P. 2d 178 (1960).

Federal court decisions supporting the power to detain suspicious persons briefly for an explanation of their actions, have distinguished between such detentions and arrests. In *Wilson v. Porter*, 361 F. 2d 412, 414-415 (9th

Cir., 1966), the Court held:

"While it is clear that at the time appellee's car was pulled over probable cause for an arrest did not exist, it is also clear that not every time an officer sounds his siren or flashes a light to flag down a vehicle has an arrest been made. The initial act of stopping appellee's car was not an arrest. Granting that the constitutional prohibition against unreasonable searches and seizures makes no distinction between informal detention *without cause* and formal arrest *without cause*, there is a difference between that 'cause' which would justify informal detention short of arrest and the probable cause standing required to justify that kind of custody traditionally denominated an arrest.

We take it as settled that there is nothing *ipso facto* unconstitutional in the brief detention of citizens under circumstances not justifying an arrest, for purposes of limited inquiry in the course of routine investigations."

The court made clear that there must be a suspicion based upon facts from which it can determine that the detention was not arbitrary or harassing.

And in *United States v. Vita*, 294 F. 2d 524 (2d Cir., 1961), where appellant was asked to come to FBI headquarters to answer questions, and was told that he was not under arrest and could leave whenever he chose, the Second Circuit ruled:

"Private citizens who are detained may not, of course, be compelled to answer the questions of the authorities if they wish to remain silent. And the reasonableness of the time for which a person is detained necessarily depends upon his continued willingness to cooperate in answering questions. Most persons, even hardened criminals, will not refuse to cooperate altogether; they

are far more likely to talk and make a pretense of cooperation."

The District Court commented in *United States v. Bonanno*, 180 F. Supp. 71, 78 (S.D.N.Y., 1960), reversed on other grounds 285 F. 2d 524 (2d Cir., 1961):

"I believe that the relative dearth of authority in point can be explained by the fact that few litigants have ever seriously contended that it was illegal for an officer to stop and question a person unless he had 'probable cause' for formal arrest.

. . .

... It cannot be contended that every detention of an individual is such a 'seizure'. If that were the case, police investigation would be dealt a crippling blow, by imposing a radical sanction unnecessary for the protection of a free citizen. See also *United States v. Thomas*, 250 F. Supp. 771 (S.D.N.Y., 1966; *Lipton v. United States*, 348 F. 2d 591 (9th Cir., 1965)."

The court in *United States v. Vita*, *supra*, notes the advantage to a citizen who may answer questions and give a satisfactory account of himself without being formally charged before his explanations are considered. The same conclusion was arrived at in *United States v. Thomas*, 250 F. Supp. 771 (S.D.N.Y., 1966), where the Court held at pages 794-95:

"To the innocent person seeking to avoid the consequences of arrest, a reasonable period of detention during which he can explain his actions and vindicate himself is a welcome right and but a minor inconvenience as compared to arrest."

The New York courts have also upheld this distinction. The Court of Appeals in *People v. Rivera*, *supra*, 14 N. Y. 2d at p. 445 (1964), citing *People v. Marendi*, 213 N. Y. 600

(1915), ruled:

“ . . . the evidence needed to make the inquiry is not of the same degree or conclusiveness as that required for an arrest. The stopping of the individual to inquire is not an arrest and the ground upon which the police may make the inquiry may be less incriminating than the ground for an arrest for a crime known to have been committed. It is enough for the purposes of this case to rule that the police were justified in the record as here developed in stopping and questioning defendant.”

This analysis accords with New York's definition of arrest as contained in §167 of the N. Y. Code of Criminal Procedure, Supp. amended 1967:

“Arrest is the taking of a person into custody that he may be held to answer for an offense.”

Other jurisdictions are in accord. See e.g. *Cannon v. State*, 53 Del. 284, 168 A. 2d 108 (1961); *Cornish v. State*, *supra*; *Blager v. State*, 162 Md. 664, 161 A. 1 (1932); *Huebner v. State*, *supra*; *Commonwealth v. Hicks*, *supra*.

Nor do this Court's decisions in *Rios v. United States*, 364 U. S. 253 (1960), *Henry v. United States*, 361 U. S. 98 (1959), and *Brinegar v. United States*, 338 U. S. 160 (1949), equate a stop with an arrest. In *Henry* the prosecution conceded that an arrest took place when federal agents stopped a car in which cartons of whiskey were then found. Thus, the sole remaining question was whether the arrest took place pursuant to probable cause. Since this Court's language at page 103 (“for purposes of this case”) appears to confine the decision to the circumstances concededly presented, there is no basis to infer that an arrest takes place whenever a car is stopped and the driver is asked to show a driver's license. Thus, the case cannot

support the proposition that no car may be stopped under any circumstances without probable cause.

The *Rios* case explicitly recognized the right to stop and question. At page 262 this Court noted:

"But the Government argues that the policemen approached the standing taxi only for the purpose of routine interrogation, and that they had no intention to detain the petitioner beyond the momentary requirements of such a mission. If the petitioner thereafter voluntarily revealed the package of narcotics to the officers' view, a lawful arrest could then have been supported by their reasonable cause to believe that a felony was being committed in their presence. The validity of the search thus turns upon the narrow question of when the arrest occurred, and the answer to that question depends upon an evaluation of the conflicting testimony of those who were there that night."

It is apparent that the idea of detention for routine investigation was accepted as not amounting to an arrest, since this Court remanded the case for determination of the point at which arrest occurred.

In *Brinegar* probable cause was found and there was no need to discuss or consider the power to stop cars merely for investigatory purposes.

It is not difficult to predict that, if police officers are deprived of the right to question persons abroad in a public place upon reasonable suspicion, they will be compelled to deal with suspicious circumstances by making arrests which the courts might be reluctant to hold improper. Thus the standard of probable cause for arrest will be substantially diluted. Ironically, this is the result predicted by counsel for appellant Sibron if the police are *permitted* to investigate informally. Logic compels the analysis arrived at in *Gilbert v. United States*, 366 F. 2d 923 (9th Cir., 1966),

where the Court at page 928 notes that substantial considerations favor recognition of a carefully limited right of brief police detention on less than probable cause:

"If even slight interference with freedom of personal movement is invariably conditioned upon a showing of prior probable cause, then either the standard of probable cause will be lowered, and with it the protection against formal arrests and substantial interferences with liberty . . . or police activity which appears perfectly proper when measured against a standard of reasonableness will nonetheless be forbidden."

See in accord *United States v. Thomas, supra*, 250 F. Supp. at page 796:

"If the police seek to justify their actions as an arrest based upon probable cause, the dangers are great. For if the concept of probable cause is expanded to cover these necessary though ambiguous cases, the effect will be to widen the power of the police to visit upon persons the consequences of arrest when such should not be done. Thus the constitutional standard of probable cause prior to an arrest, and the protection it affords, will be diluted to the point that situations warranting a stop, question and detention will be considered an arrest though such should not be the case."

Judicial proscription of the common law right to "stop" would thus create an intolerable dilemma. Either the public would be deprived of the right to be protected by brief police questioning of suspicious persons, or the rights of citizens whose questioning would be termed an arrest (and entered on police records) would be defeated. *Cannon v. State, supra*.

POINT II

The right to stop and inquire includes a corollary right to self-protection.

A recent study indicated that of the suspects questioned in a public place by police officers, 10% were armed with knives and 10% were carrying guns. Albert J. Weiss, Jr., "Personal and Property Searches in Radio Dispatched Police Work: An Overview of the Data from Three Cities" (Ann Arbor: University of Michigan, 1966) pages 4-6.

Professor Allen P. Bristow has conducted a study that has indicated that the failure to make a proper search is a circumstance in 19% of the cases in which police officers are shot. Bristow, Allen P. "Police Officer Shootings—A Tactical Evaluation" 54 Journal of Criminal Law, Criminology, and Police Science, 1963, page 95. Analysis of the particular circumstances under which police officers are in the greatest danger showed that where suspects were stopped in vehicles, the greatest hazard of a police officer's being shot occurred after his approach and while he was (1) issuing a citation, (2) interrogating or (3) using his radio (Bristow, pp. 93-94).

The risk of injury increases with the degree of urbanization in the community. As was found in the President's Commission on Law Enforcement and the Administration of Justice in its Task Force Report: Crime and Its Impact—An Assessment, *supra*, page 141:

"Offenders from areas of slight or moderate urbanism in contrast to offenders from areas of extensive urbanism are not frequently definite criminal social types, characterized by criminal techniques, criminal argot and a definite progressive criminal life history, at least prior to prison experience."

Even without such studies and statistics, there can be no valid legal basis for depriving police officers, as opposed

to other categories of persons, of the right to self-defense. This right can best be implemented by permitting protective searches in cases where the officer has reasonable grounds to suspect that the person he is questioning is armed and might use a weapon against him. Counsel for appellant Sibron admits at the outset (brief, p. 34) that a police officer who feels threatened will search for weapons:

"... He will frisk to protect his life no matter what a statute authorizes or what the court decisions say. His instinct for self-preservation will dictate his course of action."

It is difficult to conceive of how such a limited protective search can be called unreasonable—and unreasonableness is the sole basis upon which a search may be invalidated under the Fourth Amendment. *United States v. Rabinowitz*, 339 U. S. 56 (1950); *Elkins v. United States*, 364 U. S. 206 (1959); *Carroll v. United States*, 267 U. S. 132, 147 (1924).

It should be noted at the outset that, contrary to the erroneous implications in appellant Sibron's brief, the statute in question sets up a two-fold requirement. First it provides that the officer have facts upon which to base a reasonable suspicion that someone in a public place may be committing or be about to commit a felony. Second, he must have further facts upon which to base his reasonable suspicion that he may be in danger of life or limb if he does not search this person for a dangerous weapon. This suspicion can be based upon the suspect's actions, bulges in clothing, or sudden movements. Other factors are summarized in *Detection of Crime*, Lawrence P. Tiffany, Donald M. MacIntyre, Jr., and Daniel L. Rotenberg (Little Brown & Co., Boston, 1967) at page 48:

"Whether regular patrol officers conduct a frisk depends somewhat on the size and age of the suspect or suspects, the crime suspected, the relative isolation of the area in which the stop is made, the amount of light,

whether the officer is alone, how many suspects are detained, and other similar factors."

To overcome the obvious difficulty in taking the position that officers may not prevent attack upon themselves by a weapons search, appellant Sibron contends that the statute in question authorizes not merely the limited "frisk" but all types of searches. The case of *People v. Taggart*, 20 N. Y. 2d 335 (1967), is cited as reversing the rule created in *People v. Rivera, supra*, and *People v. Peters*, 18 N. Y. 2d 238 (1966), carefully limiting the permissible "frisks" authorized under § 180-a.

However, *Taggart* has not removed the restrictions on the kinds of searches permissible under the statute. The case involved unusual circumstances which the concurring opinion of Justice Van Voorhis compared to an officer's reasonable suspicion that someone is carrying a bomb on an airplane. In *Taggart*, a detective had received an anonymous telephone call exactly describing a young man who would be at a certain corner, with a revolver in his left-hand jacket pocket. The detective observed a man at the location indicated, fitting the complete description given and standing in the middle of a group of children. The officer reached into the pocket described and found the revolver. The Court based its decision permitting more than a "frisk" upon the unusual circumstances—the telephone call indicating the exact location of the weapon and the danger to the children:

"It would seem unreasonable to require an officer in that situation to engage in a preparatory and undoubtedly dangerous frisk—particularly in view of the fact that the defendant was standing in the middle of a group of children at the time of the search." (at p. 343).

Moreover, the corroboration provided by the suspect's location and appearance was virtually tantamount to sup-

plying "probable cause" to believe that he possessed a revolver. See *Draper v. U. S.*, 358 U. S. 307 (1959).

The purpose of a weapons search and the method of carrying it out were well summarized in *People v. Rivera*, *supra*, 14 N. Y. 2d at page 447:

"Ultimately the validity of the frisk narrows down to whether there is or is not a right by the police to touch the person questioned. The sense of exterior touch here involved is not very far different from the sense of sight or hearing—senses upon which police customarily act.

The fact that the police detective actually found a gun in defendant's possession is neither decisive nor material to the constitutional point in issue. The question is not what was ultimately found but whether there was a right to find anything."

As was found by Richard Kuh, "Reflections on New York's 'Stop and Frisk Law' And Its Claimed Unconstitutionality," 56 *Journal of Criminal Law C. & P. S.* 32 (1965), p. 37:

"Customary police *self-protective* practice is all that is authorized by the 'Stop and Frisk' law: A 'patting down' for bulky objects that may be guns or knives, followed by a reaching into clothing or a turning out of pockets only when such solid bulges have been located. Concealed non-bulky contraband is not ordinarily legally discoverable in such a search; there would be no way of discovering it other than the rare off-chance of its being jointly pocketed with the weapon-like bulge."

The regulations issued by the New York State Combined Council of Law Enforcement Officials at the time Section 180-a was enacted permit only an external frisk. It is further provided that "Not everyone stopped may be

searched; searches are permitted only when the officer reasonably suspects he is in danger." The officer cannot compel an answer to his questions, cannot compel the suspect to produce proof of his identity, and must explain with particularity how a suspect's attitudes and answers were unsatisfactory if he chooses to make an arrest on the basis of these answers or attitudes. An officer attempting to stop a suspect may not use his weapons or nightstick in any fashion, but may only interpose his own body.

Similarly, recent additions to Section 35.30 of the New York Penal Law restrict and define the situations in which an officer who has reasonable cause to believe that someone has committed a crime may use physical force to prevent attack or escape. These regulatory and penal law provisions, read together with the statute at bar, all attest to the good faith and effectiveness of the State's attempt to develop crime prevention methods which will pose minimum hazard or inconvenience to the innocent and maximum standards of due process for law-breakers.

In view of the proscription in New York law against police use of armed force in "stop" cases, it would be totally unreasonable and unwarranted to impose upon such officers the additional burden of being forbidden to engage in defensive searches. As was said by Glanville Williams in "Police Detention and Arrest Privilege—England", 51 J. Crim. L., C. & P. S. 413, 418 (1960), in relation to the power to frisk:

"It might be regarded as a reasonable extension of the existing law of self-defense, or as an application of the doctrine of necessity . . ."

POINT III

Evidence obtained pursuant to Section 180-a is admissible in a criminal prosecution.

Appellant Sibron admits, at pages 42-43 of the brief, that it is difficult to argue that the statute in question is unconstitutional based upon its text and the regulations issued when the statute was enacted. However, he argues that the decisions of the New York Court of Appeals in *Peters* and *Sibron* have construed the statute in such a manner that it violates the Fourth Amendment. Whatever the merits of appellants' contentions that the statute was improperly applied to them, the fact cannot be obscured that this Court has before it the validity of the statute on its face, not only instances of its application to particular convictions. See *Lovelace v. United States*, 357 F. 2d 306 (5th Cir., 1966); *Shuttlesworth v. Birmingham Board of Education*, 162 F. Supp. 372 (N. D. Ala. 1958), aff'd 358 U. S. 101 (1958); *Capoath v. United States*, 238 F. Supp. 583 (S. D., Texas, 1965).

The care with which the rights of the public are protected by the statutory language is evident in the previously described requirement that a police officer not only have a reasonable suspicion that a felony has been or is about to be committed, but also that he may not conduct a "frisk" without facts upon which to base a reasonable suspicion that he is in danger of attack. Thus there is no relation to the arbitrary general searches condemned in *Camara v. Municipal Court*, 387 U. S. 523 (1967), which appellant Sibron fallaciously attempts to cite as apposite to this case.

It is clear from this Court's decisions in such cases as *Brinegar v. U. S.*, *supra*, *Carroll v. U. S.*, *supra*, and *U. S. v. Rabinowitz*, *supra*, that the reasonableness of a search must be tested by the circumstances which have

occasioned it. Where these circumstances include demonstrable elements of personal danger to a police officer, it is obvious from the standpoint of law and logic that a protective search is not only proper but inexorably necessary. *State v. Dilley, supra*; *People v. Machel*, 234 Cal. App. 2d 37, 44 Cal. Repr. 126, 130-32 (1965), cert. denied 382 U. S. 839 (1965); *Commonwealth v. Hicks, supra*. Since such a search is valid there is no reason to require officers to discard contraband which may accidentally be found in the course of such a search.

As was held in *People v. One 1958 Chevrolet*, 5 Cal. Repr. 128, 133 (2d District, 1960):

"... the finding of the [marijuana] cigarette was incidental to the precautionary search for weapons. The officers had the right to make such precautionary search, and they were not required to overlook marijuana which came to their notice during such search."

See in accord *People v. Rivera, supra*.

Appellant Sibron uses the case of *Mapp v. Ohio*, 367 U. S. 643 (1961), as a springboard in his attempt to change New York law so that such contraband cannot be admitted into evidence against a defendant regardless of the necessity for the search through which it was obtained. However, the rationale of *Mapp* is inapplicable to this case. An officer who—in good faith based upon particular facts—fears danger to himself should not and cannot be deterred from "frisking" a person detained. Thus, inadmissibility of evidence so obtained would not serve as a deterrent to such a "frisk." *Mapp* was predicated upon the fact that if evidence could be freely used regardless of how it was found, police officers would be encouraged to utilize unlawful methods of crime detection. Such considerations cannot be present here and, therefore, the only result of excluding contraband found pursuant to "frisks" would be to permit continuation of violations of State law

by suspects without changing the pattern of police defensive measures.

Appellant Sibron contends (at p. 36) that some police officers will search in the absence of any need for self-protection, in spite of the specific prohibition against such conduct in the regulations issued by the New York State Combined Council of Law Enforcement Officials. It should be noted at the outset that such an occurrence could not invalidate the State's right to provide for "stops" and "frisks". As was said in *United States v. Vita, supra*, 294 F. 2d at page 530:

"But the possibility that powers given to law enforcement officers may be abused does not require Government agents to be left powerless to make reasonable inquiry."

The crux of the question is whether the standard contained in the instant statute is sufficiently definite to provide a basis for court review which customarily and traditionally checks abuses and misuses of authority by police officers. Appellant Sibron repeatedly asserts that while the standard of "probable cause" to believe a crime has been committed is distinct and precise, the term "reasonable suspicion" in the context of Section 180-a lacks such precision. Analysis demonstrates precisely the contrary—both standards are capable of similar review and affirmation by the courts.

In *Brinegar v. United States, supra*, this Court defined "probable cause" as follows (338 U. S. at 175):

"In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is correlative to what must be proved."

The criterion of "reasonable ground for belief of guilt" is adopted with approval at page 175, citing *Carroll v. United States*, *supra*, 267 U. S. at p. 161; *Husty v. United States*, 282 U. S. 694, 700-701 (1931); *Dumbra v. United States*, 268 U. S. 435, 441 (1925); *Steele v. United States* No. 1, 267 U. S. 498, 504-505 (1925); *Stacey v. Emery*, 97 U. S. 642, 645 (1878).

And in *Henry v. United States*, *supra* (361 U. S. at p. 102), the particular circumstances are again emphasized:

"We turn then to the question whether prudent men in the shoes of these officers (*Brinegar v. United States*, *supra* (338 U. S. at 175)), would have seen enough to permit them to believe that petitioner was violating or had violated the law."

The statute before this Court can be judged and approved by substantially the same criteria as used in *Rabinowitz* and *Henry*: would a prudent man in the shoes of a particular police officer have seen enough to permit a *reasonable suspicion* that petitioner was violating or about to violate the law. This standard is not "vague and unworkable" nor does it leave the permissible conduct to the unfettered discretion of the police officer.

As in "probable cause" cases, the officer must indicate the facts upon which his reasonable suspicion was based (See also regulations cited *infra* at Point II), both as to his reason for stopping a suspect *and* as to his reason for frisking him. Since the standard is entirely factual and situational, appellant Sibron's contention that the courts would always permit a policeman to conduct a defensive search must be rejected. The courts would require the officer to justify the "frisk" on the basis of the particular situation in which he was involved and the particular suspect's acts.

Appellant Sibron argues that (brief, p. 26):

"... The only possible conduct not held reasonably suspect is the perfectly normal."

The implication is that the statute permits invasions of privacy occasioned solely by non-conformity—that any unusual factor in appearance or behavior may be the basis for harassment.

The fallacy in this argument is apparent. To say that normal behavior *would not* give rise to questions does not mean that the converse is true. Many forms of behavior, such as singing operatic arias while strolling down Fifth Avenue, might be unusual and unconventional, but would certainly not lead to a reasonable suspicion that a felony was about to be committed. Ultimately, the police officer's judgment, while built upon greater experience than the average person's, will be checked against the court's standard as to what other prudent men might have done.

POINT IV

The right to stop and question can be reviewed independently of the question of the admissibility of contraband.

The Fourth Amendment cases which have held that in order to be admissible in a state or federal prosecution, evidence must have been obtained pursuant to probable cause, were predicated upon searches wholly different from that envisioned by the instant statute. *Mapp v. Ohio, supra*; *Hoffa v. United States*, 385 U. S. 293 (1967); *Carroll v. United States, supra*; *United States v. Rabinowitz, supra*. However, these cases clearly emphasize the reasonableness of the search as the crucial factor and, therefore, their rationale leads to the conclusion that evidence accidentally found as a result of a lawful protective search by a police officer must be admissible in evidence.

Assuming *arguendo*, however, that the above cited cases were read to require probable cause in addition to reasonableness before evidence can be admissible in a criminal proceeding, regardless of the grounds for the limited search

in question, it is respectfully submitted that this Court should still approve and uphold the stop and defensive search authorized by Section 180-a.

Protective searches are qualitatively different from any other kind of search. They do not seek evidence of crime or the fruits of crime, but are merely a mechanical adjunct to the well-established common law right to make inquiry where there is reasonable suspicion to believe that a felony has been or will be committed. The searches previously considered by this Court have been intricately connected with gathering evidence. Searches incident to arrest are sometimes categorized as protective, but they serve the equally important function of preventing destruction of the evidence of crime by the arrested person. See, e.g. *Carroll v. U. S.* *supra*; *Agnello v. U. S.*, 269 U. S. 20 (1925).

No such motivation or purpose is contemplated in the instant statute. Search is permitted and provided for only because it is a necessary corollary to the right to stop. Police officers cannot question without being secure in their own safety. Since this is a relatively new statutory conception, this Court could permit the reasonable search but develop an appropriate rule concerning admissibility of contraband found.¹ Cf. *Musselman Hub-Brake Co. v. Comm. of Internal Revenue*, 139 F. 2d 65 (6th Cir., 1943), where two contradictory provisions of the Internal Revenue Code were construed; *Shapiro v. United States*, 335 U. S. 1 (1948), rehearing denied 335 U. S. 836 (1948); *Clouse v. American Mutual Liability Insurance Co.*, 232 F. Supp. 1010 (E. D., S. Car., 1964).

This approach has been taken by the Court of Appeals of Ohio in the decisions below in *State of Ohio v. Terry*:

¹ Even under this rationale, an indictment for illegal possession of weapons (as opposed to other forms of contraband) would not violate the spirit of the rule this Court would fashion.

The reasoning of the Court (214 N. E. 2d at p. 120) was as follows:

"However, we must be careful to distinguish that the 'frisk' authorized herein includes only a 'frisk' for a dangerous weapon. It by no means authorizes a search for contraband, evidentiary material, or anything else in the absence of reasonable grounds to arrest. Such a search is controlled by the requirements of the Fourth Amendment and probable cause is essential. *White v. United States* (1959), 106 U. S. App. D. C. 246, 271 F. 2d 829. Therefore, we hold that, on the facts presented in the instant case, the frisk for dangerous weapons was valid as an incident to a valid inquiry by the police. Each case must be decided upon its own facts."

The Court added at pages 121-122:

"The States are not precluded from developing 'workable rules' governing arrest, searches and seizures to meet the practical demands of effective criminal investigation and law enforcement, provided those rules do not violate the constitutional proscriptions against unreasonable searches and the concomitant command that evidence so seized is inadmissible against one who has standing to complain. *Ker v. State of California* (1963), 374 U. S. 23, 83 S. Ct. 1623, 10 L. Ed. 2d 726; *Beck v. State of Ohio* (1964), 379 U. S. 89, 85 S. Ct. 223."

It is respectfully urged that no possible balancing of interests could lead to the conclusion that vital investigatory functions must be suppressed by the courts, or that the police officer should be required to pursue his questioning without disarming a suspect who in the particular circumstances would give a prudent man reasonable suspicion to believe that his life was endangered.

CONCLUSION

For all the foregoing reasons, the constitutionality of Section 180-a of the New York Code of Criminal Procedure should be upheld, and the common law right to stop and disarm pursuant to reasonable suspicion should be affirmed.

Dated: New York, New York, October 25, 1967.

Respectfully submitted,

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SUPREME COURT. U. S.

MICHAEL JUVILER
in *Sibron v. New York*,
No. 63

IN THE
Supreme Court of the United States

October Term, 1967

No. 63

NELSON SIBRON, *Appellant*,
against

THE STATE OF NEW YORK, *Appellee*.

On Appeal from the Court of Appeals of the
State of New York

No. 74

JOHN FRANCIS PETERS, *Appellant*,
against

THE STATE OF NEW YORK, *Appellee*.

On Appeal from the Court of Appeals of the
State of New York

**BRIEF OF DISTRICT ATTORNEY OF
NEW YORK COUNTY, AMICUS CURIAE**

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Office Supreme Court, U.S.
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State of New York**

**BRIEF OF DISTRICT ATTORNEY OF
NEW YORK COUNTY, AMICUS CURIAE**

Interest of Amicus

New York County, with its conglomeration of residential, commercial, industrial, financial and amusement areas, its transportation centers, and its varied population, has problems in common with urban areas throughout America. Like other metropolitan centers, the County is facing "the challenge of crime in a free society"—the challenge of coping with a worsening crime problem within the framework of due process of law. Believing that the "stop and frisk law" represents a reasonable accommodation between effective law enforcement and individual freedom, the New York County District Attorney's Office combined with other agencies in supporting the statute, and in presenting guidelines for its proper administration by peace officers throughout the State. We join in urging the Court to preserve it.

Introduction and Summary of Argument

A New York City policeman on motor patrol received a radio alarm that two men had just committed an assault and robbery with a gun, and that two suspects were seen entering a taxicab, which proceeded in an unknown direction. About five minutes later, a few blocks away, the officer observed a cab with two male passengers coming from the direction of the reported crime. The officer stopped the cab, and the driver said that he had picked up his "fares" near the place reported in the alarm. The officer made an external "frisk" of the suspects' clothing, finding nothing. They denied knowledge of the crime, and were released, having been detained for two

minutes.* Another officer, on foot patrol at 10:00 p.m. in a residential neighborhood of West Harlem where many burglaries had been reported, observed a man for three minutes "going from roof to roof." The patrolman stopped the man on a roof, asked what he was doing, and was told that the man was "looking for a guy who took his watch." During the encounter, the patrolman examined the suspect for weapons, and none was revealed. The man was not taken into custody; the incident took ten minutes.**

These two examples illustrate the two major functions of "stop and frisk" in aiding legitimate police patrol. As the first incident shows, the authority to stop and briefly detain a suspect is a reasonable means of investigating a known crime, or a crime which the officer has probable cause to believe has occurred. It fills a gap, opened by a lack of probable cause to arrest a particular person, but essential to close to prevent the escape of a fleeing suspect, whose identity may never be learned again. The second instance illustrates the necessity of the stop in preventing crime—an equally important police duty—where the situation is still too ambiguous for a criminal charge, but nevertheless calls for immediate interruption of the suspect's activities, and superficial inquiry into his identity and purposes. The authority which New York's statute grants the police officer to protect himself by conducting a limited

*Report of Stopping by Force or Stopping Accompanied by Frisk, Form U.F. 250, February 22, 1967, Serial Nos. 8, 9, 34th Precinct, N.Y.C. Police Department.

**Report of Stopping by Force or Stopping Accompanied by Frisk, Form U.F. 250, October 1, 1964, Serial No. 3, 30th Precinct, N.Y.C. Police Department.

external examination of the stopped suspect's clothing for concealed weapons flows naturally from the reasonableness of the temporary detention itself. For it is undeniable that police responses to suspicious circumstances necessarily entail real and substantial dangers to the officers' personal safety. Persons confronted by the police in compromising situations all too often respond with violence to prevent apprehension. A tragic illustration of the risks of police patrol is provided by a landmark case previously before this Court. Shortly after midnight, a window on the second floor of a Brooklyn hotel was smashed, and two women shouted "stick-up" from the window. As a passing patrolman sought to enter the hotel, Nathan Jackson pushed his way out of the door. He later confessed that when he met the patrolman on the street he told the officer, "'There was a fight upstairs.' * * * He insisted I go with him so I got the best of him"; then Jackson shot and killed the officer.* The common assaults on police, the enormous number of deadly weapons circulating illegally in the community, and the widespread use of concealed weapons by persons who commit serious crimes, demand, in the interests of plain humanity, a limited authority to frisk persons whose conduct has aroused reasonable suspicion of criminal conduct.

However, appellants herein urge that the type of police conduct illustrated in the two cases set forth above is "unreasonable," as that term is used in the Fourth Amendment. Thus, in their view, practices considered proper and necessary by professional experts, students of law en-

* See *Jackson v. Denno*, 378 U. S. 369 (1964). Jackson's conviction at a second trial was recently affirmed. *People v. Jackson*, — N.Y.2d — (Oct. 31, 1967).

forcement, and all state and federal courts where the question has been contested, should be abandoned. The main argument presented for this drastic result is that the Fourth Amendment forbids any police interference whatever with personal freedom except upon probable cause to believe that the suspect has committed a crime or is in possession of contraband or evidence of a crime—the standard for taking a suspect into custody or obtaining a search warrant.

This Court has traditionally approached similar questions of “reasonableness” under the Fourth Amendment by considering the reason and necessity for the law enforcement measure, weighed against the degree to which individual privacy is affronted. The sound purposes of the stop and frisk authority are readily demonstrable. And the limited scope of the restraint of the citizen is clearly evident in the New York law as written, and as construed by the highest court of the State: the circumstances must reasonably arouse suspicion; detention must be brief; the officer’s effort at self-protection must be limited to an external touching of clothing, unless there are special circumstances warranting an immediate deeper examination, or the touching of the suspect discloses a potential concealed weapon. Further, the language of the statute, and its construction by the New York Court of Appeals, authorize only defensive action, not an exploratory search for evidence.

The theory of stop and frisk, thus reflected in the law of New York, is a joist in the fundamental framework of common law justice, embodied in the Constitution. In this integrated structure, the degree of restraint and interfer-

ence with privacy—from on-the-street encounter with a patrolman, through removal to the station house for booking and the bringing of a criminal charge, to conviction and imprisonment—is proportional to the degree of certainty of guilt. The stop, the pre-natal stage in the development of a prosecution, is deliberately permitted on less than probable cause for belief in guilt. So the progression of certainty must continue beyond probable cause in successive stages as the degree of curtailment of freedom rises: prima facie case for putting a man on trial, proof beyond doubt for convicting him. Minimal evidence of guilt is consistent with the minimal intrusion of the stop and frisk. But, low though the probability of guilt may be, the cause is not absent altogether. In the New York scheme, contrary to arguments made to this Court, an officer is not authorized to stop on whim the poorly dressed man on Park Avenue, the Negro walking on a “white” block, or the youth loitering in front of a corner drugstore. As written and interpreted, the statute requires a reasonable suspicion—one grounded on facts, known or communicated to the officer, which are “sufficient to warrant a reasonably cautious officer to suspect the person of committing or being about to commit certain crimes.” Moreover, the law applies only to specified offenses, not to minor infractions sometimes associated with police harassment, such as loitering, disorderly conduct or vice offenses.

The stop and frisk authority expressed in a statute and detailed in police department guidelines, and supervised not only by the courts, but by pervasive public opinion favoring restraint, can be administered without widespread abuse. The application of the stop and frisk law by the

police in the largest city in the State confirms that the police can be circumspect in the use of their authority. Extensive training material distributed to the police emphasizes self-conscious restraint in applying the law. Police reports of illustrative cases show that the appellants' claims of consistent high-handedness are unjustified. Indeed, far from showing that the police will invariably frisk a suspect, as has been charged, the evidence shows that the police have been injured or killed because they neglected to examine suspects for weapons.

The most frequent accusation of abuse, systematic discrimination against members of minority groups, bespeaks a singularly insular view. Negroes and Puerto Ricans on the streets of New York City are stopped and frisked more often than "whites." But this fact reflects no pernicious discrimination or purposeful harassment. The simple fact is that the ratio of Black and White street criminals does not parallel demographic distribution. It would be as telling to attack the law of arrest because the members of a given ethnic group are arrested out of proportion to their fraction of the population. Street crime is the product of social and economic factors which still rest like a plague over many Negro and Puerto Rican families in our City. Many of them are uprooted from other cultures, living without stabilizing family structures, and oppressed by poverty. All citizens share the sense of shame in this persistent blight upon a modern city. But it cannot be ignored as the breeding ground of crime and violence. Only blind disregard for the plainest needs could turn a police agency's attention from the ghetto streets. While the police can do little to alleviate the causes of crime, they

must concentrate law enforcement efforts where street crime is most prevalent. Responsibility to the law-abiding citizens who live in these areas demands no less than active vigil. These undeniable, if unpleasant, obligations inevitably result in the disproportion of Negroes and Puerto Ricans brought in contact with police patrolmen. To term the result "racial discrimination" perverts the term beyond meaningful content. And it may well be that the risk of discrimination and other misuse of the stop and frisk techniques has been reduced by the enactment of a statute, and its stimulation of public scrutiny and carefully drawn police guidelines.

Since the statute is not inherently defective, and misuse can be limited to isolated instances, the statute may be held constitutional, regardless of the facts of particular cases arising before this Court. Section 180-a of the New York Code of Criminal Procedure, and its administration in the three years since its enactment, represent a conscientious effort by the legislature and law enforcement agencies to apply reasonable police techniques carefully. Such instances should be encouraged, not struck down *in toto*, without clear evidence of a danger to individual freedom—evidence lacking in New York.

ARGUMENT

The New York stop and frisk statute is a reasonable, limited response to the threat of serious crimes, and to the dangers to police from concealed weapons.

"It must always be remembered," this Court has said, "that what the Constitution forbids is not all searches and seizures, but unreasonable searches and seizures" [*Elkins v. United States*, 364 U. S. 222 (1960)]. Although there is no "fixed formula" for the determination of reasonableness [*Ker v. California*, 374 U. S. 23, 31-32 (1963)], appellants Sibron and Peters, and *amici* on their behalf, suggest one. They urge that in the absence of sufficient grounds for an "arrest"—probable cause to "believe" that the person has committed a crime—a policeman may never stop a citizen abroad in a public place, detain him briefly, and question him as to his identity and his reason for being where he is, even if his conduct has aroused reasonable suspicion that he has committed or is about to commit a crime. Similarly, it is argued, without probable cause to obtain a search warrant or make an "arrest," the officer may not, for self-protection, touch the suspect—"search him"—notwithstanding reasonable ground to suspect that the officer is in danger. In so urging, appellants seek to engraft upon the Fourth Amendment fixed standards of reasonableness, not found in its text, and inconsistent with its spirit and classical interpretations of its commandments.

It "can fairly be stated that in applying the Fourth Amendment, this Court has seldom shown its unawareness of the practical demands of effective criminal investigation and law enforcement" [*Ker v. California*, *supra* at 32].

Thus, the confidentiality of informers has been affirmed [*McCray v. Illinois*, — U. S. —, 18 L.Ed.2d 62 (1967)]. Replacing formulas with a test of reasonableness, the Court recently has disapproved previous rulings prohibiting searches for "mere evidence" [*Warden v. Hayden*, — U. S. —, 18 L.Ed.2d 82 (1967)]. In *Ker v. California*, an unannounced entry by the police was held reasonable, to prevent escape and the destruction of evidence. Inherent in the Fourth Amendment concept of reasonableness, these decisions suggest, are the dual considerations of the severity of the official interference, and the interests it seeks to enforce. Applied to on-the-street encounters between policeman and civilian, this approach imports a weighing of "the seriousness of the suspected crime and the degree of reasonable suspicion possessed by the police against the magnitude of the invasion of the personal security and property rights of the individual involved."* While this reasoning is here denounced as a "scholastic pretext * * * for oppression" (brief for N.A.A.C.P. Legal Defense Fund, *amicus curiae*, p. 34), similar principles were recently approved by this Court in *Camara v. Municipal Court* [387 U. S. 523 (1967)]. There "can be no ready test for determining reasonableness," said the Court in *Camara*, "other than by balancing the need to search against the invasion which the search entails" [*id.* at 536-537].

* Barrett, *Personal Rights, Property Rights, and the Fourth Amendment*, 1960 SUP. CT. REV. 46, 63; see also Tiffany, *Field Interrogation: Administrative, Judicial and Legislative Approaches*, 43 DENVER L. JOUR. 389, 409-410 (1966); Collings, *Toward Workable Rules of Search and Seizure—An Amicus Curiae Brief*, 50 CAL. L. REV. 421, 430-437 (1962); *People v. Peters*, 18 N.Y.2d 238, 219 N.E. 2d 595 (1967), appeal pending; *People v. Mickelson*, 59 Cal. 2d 448, 380 P.2d 658 (1963); *State v. Dilley*, 49 N.J. 460, 231 A.2d 353 (1967); *United States v. Thomas*, 250 F.Supp. 771 (S.D.N.Y. 1966).

The long history of judicial and public acceptance of the theory of "stop and frisk" has been demonstrated in the briefs of appellees, and of other *amicus curiae* briefs presently before the Court. With unanimity, federal and state courts where the issue was drawn in question have approved, with or without statutory authority, the stopping and questioning of a suspect without probable cause for belief in his guilt, and, as an adjunct, the reasonable examination of his person for self-protection of the officer. It is significant that California and many other states which led this Court in applying the exclusionary rule to trials in state courts [see *Elkins v. United States*, *supra* at 224-232] have accepted such police procedures,* and that

* Stop and frisk: *People v. Mickelson*, 59 Cal.2d 448, 380 P.2d 658 (1963); *Moore v. State*, 187 A.2d 807 (Del. Super. 1963); Del. Code, ch. 11, §§1902, 1903; R. I. Gen. L. §§12-7-1, 12-7-2.

Stop: *Goss v. State*, 390 P.2d 220, 223-224 (Alaska 1964), *cert. denied* 379 U.S. 859 (1964); *People v. Henneman*, 367 Ill. 151, 10 N.E.2d 649, 650-651 (1937); *State v. Chronister*, 353 P.2d 493, 497-498 (Okla. Crim. 1960); *State v. Zupan*, 283 P. 671, 675 (Wash. 1929); *Hatfield v. State*, 112 W.Va. 424, 164 S.E. 518, 519 (1932); *Huebner v. State*, 33 Wis.2d 505, 147 N.W.2d 646, 651-652 (1967); Hawaii Rev. L. §§255-4, 255-5.

Of course, similar rulings and statutes have appeared in states that had no exclusionary rule before *Mapp v. Ohio*, 387 U. S. 643 (1961). In addition to the New York and Ohio authorities presently before this Court, see:

Stop and frisk: *Commonwealth v. Lehan*, 196 N.E.2d 840 (Mass. 1964); *Commonwealth v. Lawton*, 202 N.E.2d 824 (Mass. 1964); Mass. Gen. L. Ann. ch. 41, §98 (1958); *State v. Carpenter*, 150 N.W.2d 129 (Neb. 1967); Neb. R.S. §29-829 (Supp. 1965); N.H. R.S. Ann. §§594:2, 594:3 (1955); *State v. Dilley*, 49 N.J. 460, 231 A.2d 353 (1967); *Commonwealth v. Hicks*, 209 Pa. Super. 1, 223 A.2d 873 (1966); compare *Commonwealth v. Doe*, 167 A. 241 (Pa. Super. 1933).

Stop: *State v. Freeland*, 125 N.W.2d 825 (Iowa 1964); *Cornish v. State*, 137 A.2d 170, 172-173 (Md. 1957) [Maryland had partial exclusionary rule before *Mapp*]; *State ex rel. Branchaud v. Hedman*, 130 N.W.2d 628, 630-631 (Minn. 1964); *City of Portland v. Goodwin*, 187 Ore. 409, 427, 210 P.2d 577, 585 (1949).

federal courts, which have operated under the exclusionary rule since 1914, have also approved them.* Section 180-a of the New York Code of Criminal Procedure is a valid expression of these principles. This is demonstrated by the statutory language on its face, its construction by the highest court of the State, and its application by the police. In turning to these matters, we accept the theoretical framework provided to this Court in the briefs of appellees, and of the other *amici* supporting them.

- (a) **The statute on its face, and as interpreted by the New York Court of Appeals, permits only a limited interference with privacy.**

1. The "stop"

Ancient practice of the common law constable and current practice of the modern police officer on patrol [*cf. People v. Rivera*, 14 N.Y.2d 441 (1964), *cert. denied* 379 U. S. 978 (1965)] have been codified and clarified in Section 180-a of the New York Code of Criminal Procedure. In the first provision of the statute, dealing with the "stop," formal legislative sanction is expressed for "Temporary questioning of persons in public places." The New

* Stop and frisk: *Bell v. United States*, 254 F.2d 82 (D.C. Cir. 1958), *cert. denied* 358 U.S. 885 (1958); *McLester v. United States*, 306 F.2d 880 (10th Cir. 1962), *cert. denied* 379 U.S. 1001 (1965); *United States v. Thomas*, 250 F.Supp. 771 (S.D.N.Y. 1966); *United States ex rel. Alexander v. Fay*, 237 F.Supp. 142, 148 (S.D.N.Y. 1965); *United States ex rel. Spero v. McKendrick*, 266 F.Supp. 718, 724 (S.D.N.Y. 1967).

Stop: *United States v. Lewis*, 362 F.2d 759 (2d Cir. 1966); *United States v. Middleton*, 344 F.2d 78 (2d Cir. 1965); *McCarthy v. United States*, 264 F.2d 473, 475 (8th Cir. 1959); *Jordan v. United States*, 254 F.2d 710, 713 (8th Cir. 1958); *Gilbert v. United States*, 366 F.2d 923 (9th Cir. 1966); *Busby v. United States*, 296 F.2d 328 (9th Cir. 1961), *cert. denied* 369 U.S. 876 (1961); compare *United States v. Mitchell*, 179 F. Supp. 636 (D. C. 1959).

York Court of Appeals has construed this provision to permit only "limited detention for purposes of inquiry," "for a short and reasonable period" [*People v. Peters*, 18 N.Y.2d 238, 243, 244 (1966)]. This police power is restricted by the legislature to inquiries as to a specified class of serious crimes, namely, felonies, and certain misdemeanors that are considered the most dangerous to public security, including unlawful entry, possession of burglar's instruments, criminally receiving stolen property (as a misdemeanor), some sex crimes, narcotics misdemeanors, and possession of a dangerous weapon (as a misdemeanor). In excluding petty crimes, vice offenses (such as prostitution and small-scale gambling), and disorderly conduct, the statute reduces the opportunities for police harassment, and proclaims that interferences with privacy, however slight, should not be undertaken where the public interest is minor,

Further, the "stop" for inquiry may not be made on bare suspicion or guess, but only upon a reasonable suspicion that the person is committing, has committed or is about to commit a crime. The phrase "reasonably suspects" is deliberately designed to convey a lower basis for attributing guilt than probable cause to "believe." The "ground upon which the police may make the inquiry may be less incriminating than the ground for an arrest for a crime" [*id.* at 242]. It is "somewhat below probable cause on the scale of absolute knowledge of criminal activity" [*id.* at 245]. Contrary to suggestions made to this Court, the law, as construed, plainly does not authorize stopping the nocturnal stroller, the passer-by with a criminal record, the shabbily dressed man on Fifth Ave-

nue, the bohemian, the Negro in a "white" neighborhood, entirely on the whim of the officer.

"Where a person's activities, together with facts and circumstances of which a police officer has reasonably trustworthy information, are sufficient to warrant a reasonably cautious officer to suspect the person of committing or being about to commit certain crimes, that person may be detained and asked for his name, address and an explanation of his activities" [*id.* at 247].

This definition, it may be noted, parallels classic definitions of probable cause to believe, but is calculated to cover more situations.

An illustration of reasonable suspicion was provided by the court in *Peters* in its reference to the facts of that case: the experienced officer, having heard a noise at his front door, "twice observed two men, whom, as a 12-year resident, he did not recognize as belonging in the building, tiptoeing around the top floor of an apartment house. When his door slammed, they hastily exited by the stairway, not the elevator," and he heard them running down the stairs [*id.* at 241, 242]. In the *Rivera* case, *supra*, wherein the concept of reasonable suspicion was applied before the statute became effective, the officers observed two men late at night in front of a bar in an area known for burglaries and robberies, walking up and down and stopping occasionally to look in the window. One suspect then looked in the direction of the officers and said something to his companion, and they walked rapidly away from the officers. The Court of Appeals cited the *Peters* and *Rivera* decisions in *People v. Teams* [18 N.Y.2d 835 (1966), affirming 20 A.D.2d 803 (2d Dept. 1964), 25 A.D.2d 496 (2d Dept.

1966)], as authority for upholding the detention of a suspect on the basis of two anonymous telephone calls informing the police that "Big Jim" was firing a gun in the street, coupled with the officer's knowledge of the suspect's reputation as the "enforcer" of the neighborhood. Similarly, in *People v. Taggart* [20 N.Y.2d 335 (1967)], the court's most recent discussion of "reasonably suspects," the officer received a telephone call from an anonymous caller who reported that a young man of a certain description, wearing "white chino-type pants," had a loaded .32 caliber revolver in his left jacket pocket, and was on a specified street corner. Proceeding to that location, the officer observed a young man who fit perfectly the description provided. And, in *People v. Sibron* [18 N.Y.2d 603 (1966)], the suspect was observed over a period of eight hours talking with and in the company of known narcotic addicts.

Although the New York Court of Appeals has only recently had occasion to discuss reasonable suspicion, the standard is not novel. It was used at common law to define the constable's power to detain persons abroad. In *Beckwith v. Philby* [6 B.&C. 635, 638-639, 30 R.R. 484, 487 (K.B. 1827)], a suit for assault and false imprisonment, the plaintiff was observed in the evening in possession of a saddle and bridle. The defendant constable had been aware of many thefts of horses within the preceding month, although not for some days. He questioned the plaintiff, whose answers induced the constable to think he had stolen a horse, whereupon the constable searched and detained him. This action was approved, on the theory that "a constable having reasonable ground to suspect that a felony has been

committed, is authorized to detain the party suspected until inquiry can be made by the authorities. Now in this case—the conduct of the plaintiff had given the defendants *just cause for suspecting* that he either had committed, or was about to commit a felony” (emphasis added). The concept of reasonable cause to suspect has been used in federal customs statutes since the time of the enactment of the Fourth Amendment, importing less than probable cause to believe, but more than a groundless suspicion [1 Stat. 43 (1789); 14 Stat. 178 (1866); 19 U.S.C. §482; Note, 46 HARV. L. REV. 1307 (1933); Leagre, *The Fourth Amendment and the Law of Arrest*, 54 J. CRIM. L., C.&P.S. 393 (1963); see also 8 U.S.C. §1357(c) (1952) (immigration statute)]. It is employed in six state statutes similar to Section 180-a. The numerous state and federal courts that have dealt with the theory of temporary detention of a suspect in a public place for inquiry have found the concept of reasonable suspicion workable, and no more difficult to apply in specific cases than the standard of probable cause to believe. The concept also appears in several English statutes now in force,* where it means less than probable cause for belief in guilt.**

* The Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), §66, empowers a member of the London metropolitan police force to “stop, search and detain any vessel, boat, cart or carriage in or upon which there shall be *reason to suspect* that anything stolen or unlawfully obtained may be found, and also any person who may be *reasonably suspected* of having or conveying in any manner anything stolen or unlawfully obtained * * *” (emphasis added). See also The Firearms Act, 1965, c. 44, §5.

** *Rice v. Connolly*, 2 Q.B. 414, 2 All E.R. 649 (1966); *Hamshere v. Bower*, 1965 Crim. L.R. 251 (Q.B.D.); *Seargent v. West*, 1964 Crim. L.R. 412; *Wiley v. Peace*, 1 K.B. 94 (1951).

2. The "frisk"

In its second provision, the New York statute formalizes the legitimacy of the well-established practice of examining for weapons some suspects whom an officer has stopped for questioning, if the officer reasonably suspects that he is in physical danger. Here again, the police conduct must be justified by reasons supporting the suspicion of danger [*People v. Peters, supra* at 243-244]. Although the statute speaks generally of a "search," the Court of Appeals has interpreted it to permit only a "limited frisk," defined by the Court as "the patting of the exterior of one's clothing in order to detect by touch the presence of a concealed weapon" [*People v. Peters, supra* at 245]. In construing the statute in this manner in *Peters*, the court relied heavily upon a similar principle announced in *People v. Rivera* [*supra* at 446]. The Court of Appeals has subsequently explained at length that initial internal examination of the suspect's clothing without grounds for taking him into custody may occur only under special circumstances [*People v. Taggart, supra; cf. People v. Sibron, supra*]. In New York, even lawful arrest does not permit a search of the inside of the defendant's pockets in every instance [*People v. Marsh*, 20 N.Y.2d 98 (1967) (arrest on warrant for traffic violation)].

As evidence of the meaning of the second provision of Section 180-a, appellants cite *People v. Pugach* [15 N.Y.2d 65 (1964), *cert. denied* 380 U. S. 936 (1965)], wherein opening the suspect's brief case was upheld, but that case did not arise under the statute, and the statute, by its terms, allows only examination of the "person." The court's recent citation to *Pugach* in the *Taggart* case, *supra* [20

N.Y.2d at 342], is no proof that the same result would obtain today on similar facts. Moreover, the prosecutor had established on the appeal that Pugach actually was under lawful arrest at the time of the seizure, the officers having deliberately arrested him upon probable cause to believe he had committed another crime [Schwartz, *Stop and Frisk: A Case Study in Judicial Control of the Police*, 58 J. CRIM. L., C. & P.S. 532 (1967), reprinted in N.Y.L. Journal, Nov. 28, 1967, p. 1]. Thus, the *Pugach* case has been considered "sui generis" [*ibid.*, N.Y.L. Journal at p. 4, col. 3]. In any event, none of the cases before this Court raises such a question.

Appellants also claim that *People v. Hoffman* [24 A.D.2d 497 (2d Dept. 1965)], wherein the officers conducted a very extensive frisk, is evidence that the stop and frisk authority is uncontrolled by the courts. However, that case involved a frisk incident to arrest based upon probable cause.

3. Stop and frisk in the context of the system of criminal justice

The brief pre-custodial street occurrence between policeman and suspect, covered by the New York law, is merely the first phase of an integrated scheme in the common law system of criminal justice, whereby "the probability of guilt required to subject a person to official action is directly correlated to the degree of interference with individual freedom contemplated by the action" [LaFave, *Detention for Investigation by the Police: An Analysis of Current Practices*, 1962 WASH. U. L. REV. 331, 359 (1962)]. To approach a person on the public street, a policeman needs no grounds for suspicion or belief concerning his guilt. If the citizen is stopped and detained, reason-

able suspicion is required. Taking the suspect into custody demands probable cause to believe that he has committed a crime, and a prima facie case is required to hold him for trial. Finally, conviction and imprisonment must be founded upon proof of guilt beyond a reasonable doubt.

A similar scale of degrees of probability is applicable to police conduct ascribable loosely as a "search." In the New York scheme, a "limited frisk"—a "patting of the exterior of one's clothing"—is usually the only form of examination permitted under the statute, unless the touching discloses a potential weapon. This minor contact requires reasonable grounds to suspect that the officer is in danger. Probable cause to believe that a crime has been committed, or that contraband will be found, permits a full examination of the suspect's clothing, incident to taking him into custody, or pursuant to a search warrant. Finally, proof of guilt beyond a reasonable doubt permits complete removal of the privacy of one's person, associated with incarceration after a criminal conviction. In short, the underlying theory of stop and frisk—relating the degree of certainty of guilt to the degree to which privacy is affected—is not violative of due process, but, instead, is inherent in the entire process of justice embodied in the Constitution.

4. The application of the statute to particular facts distinguished from the construction of the statute

Appellants and others on their behalf incorrectly assert that the Court of Appeals has "construed" the statute to permit broad, unjustified incursions into privacy, and that therefore the statute, "as construed," is unconstitutional. These arguments, however, fail to distinguish between the

State court's discussion of the law in its opinions, and its application of that construction to the facts of particular cases, without opinion. The former is the statute "~~as~~ construed," not the latter. Assuming that "the statute cannot constitutionally be applied * * * in the circumstances of" a given "case," its unconsidered application to such facts by the State court does not require voiding the statute itself [*Brown v. Louisiana*, 383 U. S. 133, 142 (1966)]. The express interpretation of the New York statute in the opinions of the Court of Appeals is reasonable and limited; therefore, it does not follow, as appellants assume, that if specific judgments are reversed and the evidence in those cases held inadmissible, the entire statute must be struck down in the same stroke, and held inapplicable under any circumstances, however reasonable. Appellants' claim, properly analyzed, is that the application by the Court of Appeals of its discussion of the statute to specific fact situations without discussion has been faulty.

For example, the court's opinions show that exploratory searches for incriminating evidence are not authorized by the law, but only self-protective examinations of the suspects, and that a "frisk" is normally the only permissible physical contact with the suspect. Moreover, the State court has announced its awareness of the risks of reliance upon the unsupported testimony of police officers as to the basis for a search for weapons [*People v. Taggart*, *supra* at 343; compare *People v. Malinsky*, 15 N.Y.2d 86 (1965), with *McCray v. Illinois*, — U. S. —, 18 L.Ed.2d 62 (1967)]. However, in *Sibron*, the Court of Appeals has, in the view of both parties before this Court, mistakenly overlooked an exploratory search in affirming the judgment without opinion. The Court of Appeals apparently concluded that

Sibron's move toward his pocket, in response to the officer's remark, could have been suspected by the officer to be a movement for a weapon, justifying the officer's immediate defensive lunge for the concealed item without a preliminary external patting of Sibron's pocket. Although the State court's view of the facts is arguable, its general interpretation of the statute remains: normally, a frisk is the only measure authorized, in the absence of a special circumstance rendering an immediate search reasonable. Analogously, in *Peters*, the most challenging aspect of the judgment, on the facts in the record, is that the officer pointed his gun at the suspect in apprehending him, although the Court of Appeals did not treat this fact in its opinion, and, granting the reasonableness of the stop and frisk theory, the behavior of the officer, as described in the opinion, was clearly not an unreasonable use of force under the circumstances. In the absence of an authoritative legislative or judicial explication to the contrary, the statute is best read to continue the common law authorization of use of reasonable force. The confines of reasonable force are debatable in various situations, but the general concept is unimpeachable.

This Court has rejected challenges to the constitutionality of state obscenity statutes, while at the same time reversing a particular conviction on the ground that the lower courts misapplied prevailing definitions of obscenity to the facts of the case, thereby violating freedom of speech. Such misapplication of state law was distinct from the state court's interpretation of the statute, and did not render the statute inherently defective. Comparably, in *Shuttlesworth v. City of Birmingham* [382 U. S.

87 (1965)], this Court accepted the state appellate court's express construction of a loitering statute, but reversed the defendant's conviction because the statute as construed could not constitutionally be applied to the facts in the record.

Furthermore, if the theory of stop and frisk is constitutional, presumably in jurisdictions without a statute its application by the courts to particular facts would be distinct from the validity of the theory itself. Analogously, if a jurisdiction had no statute governing warrantless arrests, courts there would be free to apply the probable case standard to such arrests on a case-by-case basis, and failure to apply the standard properly in a given case would not vitiate the underlying theory. It would be absurd if civilians and policemen in a state which has embodied the theory of stop and frisk in a statute would be entitled to less protection than their neighbors in states with no statute, solely because the local court's application of the theory was not always perfect. And it must be remembered that the cases presently before the Court are not a representative sample of instances in which the stop and frisk theory has been applied.

- (b) Brief detention for inquiry is a reasonable part of police patrol against serious crimes, and a limited frisk is a reasonable response to the dangers to inquiring officers from concealed weapons.**

It is becoming increasingly apparent that crime must be regarded as one of the most serious social problems in America. The high crime rates reported by the FBI, set forth in appellee's brief in *Sibron v. New York*, No. 63, are

sufficient cause for concern, but the President's Commission on Law Enforcement and Administration of Justice has shown that these statistics grossly underrate the actual amount of crime [THE CHALLENGE OF CRIME IN A FREE SOCIETY, p. 21 (1967), hereinafter CHALLENGE OF CRIME]. In addition to the direct harm from robberies, assaults, burglaries, larcenies, homicides and the other offenses which form the bulk of the burden of "street" crime, a serious indirect effect has been documented by the President's Commission: widespread fear in the community. "One-third of Americans feel unsafe about walking alone at night in their own neighborhoods," according to a leading survey [*id.* at 50]. Such fear, the Commission has found, has impoverished the lives of many Americans, especially in high-crime neighborhoods in large cities [*id.* at 52]. For the millions of Americans who are directly and indirectly victimized by crime, "The right of the People to be secure in their persons, houses, papers, and effects" is a broken promise.

Thus, the great public interest in preventing and abating crime cannot be discounted. Stopping and interrogating suspicious persons in public places is essential to these ends, since it is a vital part of the main job of a police force: patrol.

"The heart of the police effort against crime is patrol—moving on foot or by vehicle around an assigned area, stopping to check buildings, to survey possible incidents, to question suspicious persons, or simply to converse with residents who may provide intelligence as to occurrences in the neighborhood.

"The object of patrol is to disperse policemen in a way that will eliminate or reduce the opportunity for

misconduct and to increase the likelihood that a criminal will be apprehended while he is committing a crime or immediately thereafter. The strong likelihood of apprehension will presumably have a strong deterrent effect on potential criminals. The fact of apprehension can lead to the rehabilitation of a criminal, or at least to his removal for a time from the opportunity to break the law" [PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE, p. 1 (1967); see also *id.* at 58; CHALLENGE OF CRIME, p. 97].

It is clear, moreover, that proper police patrol would be impaired if the officer could not use his official authority to stop persons for brief inquiry as to their identity or purpose, without grounds for taking them into custody. For example, if a person who is reasonably suspected of being the perpetrator of a known crime appears on the patrolman's beat, authority to detain him briefly and question him should not be denied because the officer lacks grounds to remove him to the police station for booking. In a case occurring in New York City, a foot patrolman had been supplied with a photograph of a named robbery suspect, who the police had been informed was expected to appear in his area. The patrolman saw a man there whom he believed he recognized from the picture. Assuming that the information supplied to the patrolman as to the suspect's connection with the crime was insufficient to establish probable cause for belief of his guilt, or that the resemblance of the man in the street to the suspect depicted in the photograph was equivocal, nevertheless, it would have been poor police work and a breach of duty for the patrolman not to have stopped the man, detained him briefly, and asked him to identify himself. "I walked

up to him," the patrolman later reported, "I asked him for his identification. He reached into his pocket, took out a wallet and dropped it. Then he pulled his gun." As the officer struck him with the nightstick, the suspect fired, critically wounding two detectives who had approached from behind the patrolman.*

In a similar incident that took place the same year in another city, a patrolman on radio motor patrol received a broadcast alerting the police to a murder suspect. Shortly thereafter, the patrolman "pulled up alongside a man walking in the same direction. The man met the general description of the suspect wanted in connection with" the killing. Apparently the officer, while lacking grounds for outright arrest, properly used his authority to order the suspect to stop. The man "walked over to [the patrolman's] car, rested his arms on the right hand side of the car, and apparently exchanged words with [the patrolman] through the window. [The patrolman] opened the door of the left side and started to walk around the front of his car. As he reached the front wheel on the driver's side, the man on the sidewalk drew a revolver and fired several shots in rapid succession, hitting [the patrolman] four times and killing him instantly." The patrolman was J. D. Tippit of the Dallas police, the suspect Lee Harvey Oswald.** In another case, detectives at their posts in Brooklyn saw a man enter a parked Cadillac, which was listed as stolen, and sit in the driver's seat. Surely, whether or not

* N. Y. Times, April 25, 1963, p. 1, col. 7; Supervisor's Report of Employee's Injury/Sickness, Form P.A. 9, April 24, 1963, Personnel Safety Unit, Police Academy, N. Y. C. Police Department.

** REPORT OF THE PRESIDENT'S COMMISSION ON THE ASSASSINATION OF PRESIDENT JOHN F. KENNEDY, pp. 6-7 (1964).

the officers had grounds for taking the man to the station house and charging him with grand larceny of a motor vehicle, it was reasonable for one of them to walk up to inquire about the vehicle, and, in order to preclude possible flight, and reduce the risk that the man would reach for a weapon, to ask the man to get out. In response, the suspect shot the officer in the thigh, then shot the two other detectives and fled.*

Frequently, the facts known to the officer leave him unclear as to whether a crime has occurred, but the situation calls for immediate action to prevent a potential crime or apprehend a possible criminal. In an illustrative case, a patrolman saw a man at 3:00 a.m. in a "crouched position between parked cars with hands placed on door." Frisked and questioned, the suspect said that he was "looking to buy a car."** He was not detained further, but doubtless, if his intentions had been larcenous, they were promptly and effectively changed when the officer intervened and learned his identity. In another example, a New York City officer on motor patrol at night saw a woman running out of a bar, followed by two men. He could reasonably suspect that they had assaulted her, or were about to assault her. Perhaps they were innocent and she the offender, or maybe all three were running to catch a bus. Although the situation was too doubtful for an arrest, unquestionably it demanded that action be taken. The officer stopped the men and questioned them. An altercation ensued and the patrolman was stabbed under

* N. Y. Times, April 1, 1967, p. 1, col. 4.

** Report of Stopping by Force or Stopping Accompanied by Frisk, Form U.F. 250, Serial No. 8, 42nd Precinct, N.Y.C. Police Department.

the heart.* An officer responding at 1:45 a.m. to a radio alarm reporting "shots fired" at a certain address on Morningside Drive in Manhattan, arrived at the premises in time to see a man leaving, his right hand in his coat pocket. The officer would have been negligent, under all of the circumstances, not to detain the man for inquiry, and to examine his clothing externally.** Perhaps the reported noise was not connected with a crime, or the man was not the shooter. But his appearance at the place specified, at this late hour, reasonably aroused the officer's suspicions. To have let him go on his way undisturbed might have been to ignore the only means of apprehending the perpetrator of a serious assault or homicide. To have eschewed the self-protective frisk might have meant serious injury, although to use it meant only minor interference, one readily forgivable by a responsible innocent citizen.

All industries employing persons productively in circumstances of risk or injury are expected to provide safety measures to reduce the prospects of harm. Ultimately, the cost is borne by the employer, or the community. The heart of police work, the President's Commission has said, is patrol, and the frisk is the patrolman's safety belt, its costs to society minimal compared with the dangers it aims to reduce. Underlying the threat to the officer on patrol is the widespread illegal possession and use of dangerous weapons, and the consequent danger that such weapons will

* Supervisor's Report of Employee's Injury/Sickness, Form P.A. 9, April 29, 1963, Personnel Safety Unit, Police Academy, N.Y.C. Police Department.

** Report of Stopping by Force or Stopping Accompanied by Frisk, Form U.F. 250, Serial No. 1, 26th Precinct, N.Y.C. Police Department.

be in the possession of many persons who are reasonably suspected of serious crimes. New York State has done more to control and regulate concealed weapons than any other state, or the federal government. Nevertheless, the problem worsens. For example, the New York City Police Department annually reports the number of dangerous weapons received by the Police Property Clerk; last year, almost 8,000 revolvers and pistols were taken in by the police (A44).^{*} In a recent statement supporting further legislation controlling firearms, to supplement New York's "Sullivan Law" [former N.Y. Penal L. §1897, revised Penal L. §265.05 (1967)], the Commissioner of the New York City Police Department reported:

"Despite these controls, during the year 1966 in New York City, handguns were involved in approximately 5,500 instances of robbery; 184 cases of murder and non-negligent manslaughter; and approximately 2,340 cases of felonious assault. We feel that the instances of handguns use in these crimes would be far greater without our program of licensing control. It seems clear that the very nature of the weapon in terms of its size and, hence, its easy concealability makes it relatively easy for the criminal element to acquire handguns elsewhere, and bring them here."^{**}

A loaded gun or a dangerous knife is carried for use. From 1960 through 1966, eighteen New York City policemen were killed with weapons while apprehending suspects, sixteen with guns, two with knives (A43). During roughly the

^{*} References to the Appendix to this brief are preceded by the letter A.

^{**} Howard A. Leary, statement before the Subcommittee on Firearms Control of the N. Y. City Council, and the Joint Legislative Committee of the State Legislature on Firearms Control, August 24, 1967. See also CHALLENGE OF CRIME, p. 4.

same period, 69 New York City officers were wounded by gun shots, 121 by stabbings (A43). The FBI found that of the 335 police officers who were killed in the United States during these years while performing their duty, almost all were killed with handguns [1966 UNIFORM CRIME REPORTS, pp. 46-48].

The risks to investigating patrolmen from these concealed weapons are illustrated by countless such instances of assaults by suspects who are found in incriminating circumstances and facing apprehension. According to one study, for example, 43% of the policemen who are shot while investigating suspects who are in automobiles have already made the initial contact, and are interrogating, issuing a summons, or requesting a check by radio [Bristow, *Police Officer Shootings—A Tactical Evaluation*, 54 J. CRIM. L., C. & P. S. 93 (1963)]. The FBI has concluded that 12% of the police officers who were killed in the United States in the past seven years while performing their duty were slain while "investigating suspicious persons and circumstances" [1966 UNIFORM CRIME REPORTS, pp. 46-48]. Persuaded, in large measure, by recurring evidence of such assaults, the President's Commission and other distinguished students of field interrogation, and numerous state and federal courts, have considered the authority to frisk suspects under certain conditions a necessary adjunct of the imposition upon police of the duty to investigate suspicious circumstances and stop suspicious persons in the field.

Injuries occur even when safety devices are available, because in a given instance they are not used or are ineffective. The assault may precede the opportunity to frisk. Or the utility of the frisk may be vitiated by the interven-

tion of the suspect's accomplices. For example, one police report dryly notes that an officer investigating two youths who were "trying doors" at 11:35 p.m. "was apparently overpowered in the dark, poorly lighted area * * * and received gun shot wound in back."* In other instances, a normal frisk would not reveal the weapon. An officer in one such case saw a man running from the rear of the police station, shouted to him to halt, and was bludgeoned with a nightstick which the man had secreted up his sleeve.** In many other cases, the officer, out of self-restraint, or carelessness, does not use the frisk at a time when it is available to him. In one such instance, on a Saturday night in the summer of 1965, a man appeared in a tavern in New York City, told the barmaid that he was an undercover federal narcotics officer about to make an arrest, and confirmed the story by showing off a revolver. Suspicious, the lady reported the occurrence to an off-duty patrolman who was in the bar. The patrolman waited for another officer to arrive, conferred with him, and agreed to ask the suspect for identification. He asked the suspect to step into an alcove. There, the suspect fatally shot the patrolman, and he was killed running away.† Although the frisk, like the safety

* Supervisor's Report of Employee's Injury/Sickness, Form P.A. 9, January, 1965, Personnel Safety Unit, Police Academy, N.Y.C. Police Department.

** Supervisor's Report of Employer's Injury/Sickness, Form P.A. 9, April 23, 1964, Personnel Safety Unit, Police Academy, N.Y.C. Police Department.

† N. Y. Times, Aug. 1, 1965, p. 62, col. 3; Supervisor's Report of Employee's Injury/Sickness, Form P.A. 9, July 31, 1965, Personnel Safety Unit, Police Academy, N.Y.C. Police Department. In a typical case where no frisk was made, a patrolman was questioning a suspect on a street corner at 1:00 a.m., when the suspect stabbed him in the hand with a paring knife. Supervisor's Report of Employee's Injury/Sickness, Form P.A. 9, February 13, 1966, Personnel Safety Unit, Police Academy, N.Y.C. Police Department.

belt, does not prevent all injuries or deaths, it is reasonable to draw a connection between general violence by suspects who are apprehended or detained, and the utility of the frisk technique. Indeed, it is self-evident that in many of the instances of injuries described herein a reasonable frisk would have saved the officer's life or spared him injury. The suspect, too, would have been spared the consequences of his aggressive outburst.

There is no scale for balancing the life of a policeman against the embarrassment and inconvenience of a frisk to innocent private citizens whose conduct has reasonably aroused suspicion. There is no formula for measuring the physical wounds of policemen doing their duty against the injuries to the personal sensibilities of innocent persons whom officers reasonably suspect of a crime. But in our complex urban society, even more than in Donne's England, no man is an island entire unto himself. Like the innocent bystander to a crime who is called upon to suffer the interferences flowing from becoming a witness, these innocent persons may not be heard to protest that they do not wish to become "involved." And it may be presumed that only a clear showing of inherent widespread abuse would justify barring such a minor intrusion on personal privacy. We turn now to the application of Section 180-a by the police.

**(c) The statute can be applied reasonably,
and with restraint.**

The official interpretation of a statute by the agency administering it is evidence of its meaning and impact [Norwegian Nitrogen Co. v. United States, 288 U. S. 294]

315 (1933)]. In *Miranda v. Arizona* [384 U.S. 436 (1966)], this Court referred to police manuals describing various aggressive interrogation practices as evidence that station-house interrogation is inherently compulsory. By contrast, the application of the New York stop and frisk statute by the Police Department of New York City demonstrates that the law is not inherently abusive, and can be applied with restraint.

There seems to be agreement among those most familiar with this field that the stop and frisk procedures are capable of regulation and control by proper administrative efforts, and that the combination of statutory and administrative regulation of the type recently adopted in New York State is the best method of control [TASK FORCE REPORT: THE POLICE, pp. 17, 38-41; CHALLENGE OF CRIME, pp. 103-104; see TIFFANY, MCINTYRE AND ROTENBERG, DETECTION OF CRIME, pp. 88, 92-94 (1967)]. The New York City Police Department and the New York County District Attorney's Office joined with other law enforcement agencies all over the state to publish a set of "guidelines" for police officers prior to the date on which the new law became effective. "Five pages of specific requirements, limitations, prohibitions, and examples were used to elaborate upon the legislation which itself is contained in two relatively brief paragraphs. Emphasis was not placed upon defining the law so much as it was upon urging the police to exercise restraint and to act well within the outer limits of their prescribed authority" [TASK FORCE REPORT: THE POLICE, p. 17]. The President's Commission has stated:

"* * * [D]efining the amount of objectively based suspicion that justifies a 'stop,' in such a way that the

definition will be of some help to a patrolman on his beat, takes much thought and much expertise. However, it is by no means impossible. The bulletin of the New York State Combined Council of Law Enforcement Officials affords the patrolman practical guidance for his actions, including examples, factual variables, and guiding principles. In effect, this carries the New York 'stop and frisk' statutory provision into the street situations in which it is administered. The administrative guidance supplements the general legislative policy" [CHALLENGE OF CRIME, pp. 103-104].

These guidelines were distributed to all members of the New York City Police Department (A5-A13, A20). The training program in the New York City Police Department in the cautious and proper administration of the stop and frisk statute has also included lectures (A1-A4), instructions on television (A18-A24), and special recruit training (A25-A28).

The recommendation that a written report be prepared if force is used [TASK FORCE REPORT: THE POLICE, p. 183] has been implemented. A form, "U.F. 250," is to be prepared "by a member of the force each time he stops a person under the authority of the law and the stopping is done by the use of force, or the person stopped is either frisked, or frisked and searched" (A14; see also A7, A20, A28). This form, reproduced below (A17), fulfills a valuable educative function. Like the accompanying training materials, it makes plain to any officer that the power to stop, and the authority to frisk for weapons, are to be used with utmost restraint; that the stop or frisk must be justified by a reasonable suspicion—one for which a reason can be given; and that an internal examination of the suspect's

clothing is the exception, not the rule. Indeed, by its detail alone, it reminds the officer that the authority granted by the statute is to be used with care. Such explicit confinement of authority is probably the most effective way to achieve self-regulation of police in the exercise of precautionary procedures which they would undoubtedly use with or without statutory sanction.

The material distributed to the police also points up to the officer the limitations on his powers if the suspect refuses to stop or answer his questions.

"Should the suspect refuse to answer the officer's questions, the officer cannot compel an answer and should not attempt to do so. The suspect's refusal to answer shall not be considered as an element by the officer in determining whether or not there is a basis for an arrest" (A10; see also A11, A22, A27).*

The instructions properly explain that "false or unsatisfactory" answers "may serve as an element in determining whether a basis for arrest exists", (A11) [*cf. Peters v. New*

*A pamphlet entitled YOUR RIGHTS IF ARRESTED, prepared by the Civil Rights Bureau of the Office of the Attorney General of New York State, and distributed by the New York State Bar Association in cooperation with the Attorney General, includes the following discussion of the stop and frisk law:

"CAN YOU BE DETAINED WITHOUT BEING ARRESTED?"

"A policeman may wish to question you without making an arrest. The law permits a policeman to stop any person in a public place who he reasonably suspects is committing, has committed, or is about to commit a felony or other serious crime. He may demand to know your name, address, and an explanation of your actions.

"You are not required to answer; the right to remain silent is guaranteed to you by the Federal and New York State Constitutions."

The pamphlet is printed in English and Spanish editions.

York, No. 74]. However, "if an officer determines that an answer is 'unsatisfactory' and relies upon this in part to sustain his arrest, he should be able to explain with particularity the manner in which it is 'unsatisfactory'" (A11, A27). "If the suspect refuses to stop," the guidelines also provide, "the officer may use reasonable force, but only by use of his body, arms and legs. He may not make use of a weapon or nightstick in any fashion" (A7-A8; see also A11, A17, A26). Appellants urge that *Peters v. New York*, No. 74, wherein the New York City police officer used his gun, shows that these guidelines are unworkable. Surely, more evidence than this isolated case is required to support such a judgment. It may also be noted that in *Peters*, the officer, responding spontaneously to the hallway incident, may have felt that there was probable cause to believe that Peters and his confederate had attempted a burglary. Or, not being in New York City, he might have considered the encounter outside the scope of his official capacity; this was a subject of considerable doubt before the Court of Appeals' decision in *Peters* [see Curtis, *Extraterritorial Law Enforcement in New York*, 50 CORNELL L. Q. 34 (1964)].

Erring on the side of caution, the police guidelines restricted the use of the authority to stop generally to incidents occurring on the street, in open public places, such as parks, and in transportation depots. Although the statute permits a stop "abroad in a public place," reflecting the common law concept, the guidelines provided that "this phrase is viewed as not including the public portions of private buildings, such as hotel lobbies, moving picture theaters, licensed premises, etc." (A8; see also A26). This

unnecessarily restrictive view proved unworkable in the day-to-day responses of patrolmen to spontaneous incidents demanding police reaction (A37). The Court of Appeals "countermanded" this guideline in *People v. Peters, supra*, properly recognizing the reasonableness of stopping and frisking persons in other public places where crimes frequently occur, such as the common areas of residential buildings. This sound holding was subsequently conveyed to the police (A30-A32). It may be noted, however, that about three-quarters of the incidents reported by the New York City police occurred on the streets, and 80% in open areas (A37).

The Appendix to this brief also includes statistics showing the crimes typically suspected by the police officers when they used the stop and frisk law, *amicus* having listed the crimes suspected by the officer as reported in the U.F. 250 forms (A35). Crimes most frequently suspected are grand larceny, including auto-theft, and receiving stolen property; burglary and unlawful entry; robbery; criminal possession of a weapon; sale or possession of narcotics; and felonious assault. These are also the most frequent serious crimes (A46). Moreover, the high rates for such crimes (A45-A46) show clearly the public interest demanding reasonable law enforcement methods to abate them.

As to the touching of the suspect for purposes of safety, the police directives limit the statutory "search" to a patting of the suspect's clothing (A12, A17, A21-A22, A28). And the instructions also establish that the frisk may not be used to look for evidence of crime (A7, A11-A13, A17, A21-A22, A27). It has been alleged that the police will invariably frisk suspects if such authority is granted to

them under any circumstances, but it is clear from the experience in New York City that such is not the case. The fatal and non-fatal assaults upon police officers who did not frisk the suspect, illustrated above (pp. 24-25, 30), are grim refutation of this claim. The New York City U.F. 250 reports which have been filed include over 300 cases of persons who were stopped by reasonable force but who were not frisked (A34). In a typical case, patrolmen received a radio call at 1:00 a.m. about "men tampering with auto" at a parking lot. Upon arrival, the officers saw two men crossing the street from the vicinity of the parking lot carrying an automobile bumper jack. They were stopped, but not frisked, gave an explanation for their possession of the jack, and were not further detained.* Appellants cite the disclosure by the President's Commission on Law Enforcement and Administration of Justice that in New York City, according to the Police Department, statutory "searches" (frisks) "were made in 81.6 percent of stops reported" [TASK FORCE REPORT: THE POLICE, p. 185]. As is noted above, however, this Police Department statistic is based only on the cases *reported*, and the reports are designed only for stops accompanied by frisks or use of force, not for all stops. Information as to the use of the statute in Buffalo, the State's second largest city, verifies that the law is not considered a general invitation to frisk all persons stopped. In 1931 reported stops, with and without force, only 553 persons were frisked (A47).

The occasional discovery of contraband and other incriminating items by officers conducting self-protective

* Report of Stopping by Force or Stopping Accompanied by Frisk, Form U.F. 250, July 20, 1966, Serial Nos. 13, 14, 24th Precinct, N.Y.C. Police Department.

frisks is no proof that the statute is a camouflage for exploratory searches. Just as a search is not justified by what it turns up, a frisk is not voided by what it discloses. If *Sibron v. New York* represents an unauthorized search for contraband, as appellee concedes, that case is not typical of the experience with Section 180-a in New York City. It may also be noted, as appellee points out, that the record in the *Sibron* case indicates that the officer apparently did not consider that the statute had any relationship to the case.

(d) The statute is not discriminatory.

Despite—or because of—vehement reaction against the New York statute when it was enacted,* there has been no general abuse. It would appear, on the contrary, that the statute and its attendant police regulations have actually reduced abuse of citizens by field interrogation. In New York City, the Police Department has made it crystal clear to its officers that aggressive use of the statute is against official policy, and that caution and restraint are the aim of the superior officers (A3-A4, A5-A8, A11-A12, A16, A19, A23-A24, A32). The policeman “who would engage in the abuse which many citizens fear does not need the ‘stop and frisk’ authorization to do so * * *. To grant the additional alternative [to taking no action or arresting the suspect], as embraced in the ‘stop and frisk’ concept, can only help the conscientious officer to protect the community against criminal violence, and at the same time result in benefits to honest, law-abiding citizens who find

* When the law was passed, for example, an “Emergency Committee for Public Safety” was formed to assist persons abused under the law. N. Y. Post, Mar. 4, 1964, p. 3, col. 4.

themselves in circumstances which attract police attention" [Younger (District Attorney, Los Angeles County), *Stop and Frisk: Say It Like It Is*, 58 J. CRIM. L., C. & P.S. 293, 295 (1967)]. If, as appellants here suggest, the statute is to be judged unreasonable because it may be abused, "there is no police procedure which should not be judged unreasonable on the same ground" [*id.* at 299]. It is noteworthy that commentators cited by appellants and *amici* on their behalf to show potential abuse under the New York statute give examples of police misconduct in other states, but have endorsed the New York law, or similar non-statutory police procedures under proper guidelines [REPORT AND RECOMMENDATIONS OF THE COMMISSIONERS' COMMITTEE ON POLICE ARRESTS FOR INVESTIGATION, DISTRICT OF COLUMBIA, p. 64 (1962); Reich, *Police Questioning of Law Abiding Citizens*, 75 YALE L. JOUR. 1161, 1167, 1170 (1966); LaFAVE, ARREST—THE DECISION TO TAKE A SUSPECT INTO CUSTODY (1965); PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE, *supra*; TIFFANY, McINTYRE AND ROTENBERG, DETECTION OF CRIME, *supra*].

The principal claim presently before this Court as to potential abuse under the New York statute is discrimination against members of minority groups. In New York City Negroes and Puerto Ricans are stopped in disproportion to their numbers (A39). However, application of a law to persons in certain groups in disproportion to their percentage of the population does not render the statute unconstitutional. Only intentional and systematic discrimination would be sufficient to void the statute [see *Wright v. Rockefeller*, 376 U. S. 521 (1964); *Swain v. Ala-*

bama, 380 U. S. 202, 208-209 (1965); *Hoyt v. Florida*, 368 U. S. 57, 59, 69 (1957); *Beck v. Washington*, 369 U. S. 541 (1962)]. In the administration of a law, "proportional class representation is not a constitutionally required factor" [*Hoyt v. Florida, supra*; *Swain v. Alabama, supra*].

The explanation for the disparity is not systematic discrimination, but the disproportion of such persons, at this stage of our history, whose conduct arouses justifiable police suspicion—whether the policeman be white or black. Indeed, any reasonable police practice in the area of search and seizure—unannounced entry to effect an arrest, obtaining of a search warrant, or arresting a man in the street without a warrant upon probable cause—will affect persons in minority groups out of proportion to their number. It is an unavoidable fact of the development of our country that new groups arriving in the city, be they Irish, Italians, Jews, Negroes or Puerto Ricans, have committed a disproportionate share of street crimes. For example, in 1965 the United States arrest rate for FBI "Index" crimes and larceny under \$50, was four times as high for Negroes as for whites [TASK FORCE REPORT: CRIME AND ITS IMPACT—AN ASSESSMENT, p. 78 (1967)]. The difference is apparently even higher in metropolitan areas [*id.* at 210]. In the national capital, where Negroes comprise about half the population, 85% of the robberies, assaults, burglaries and similar crimes are committed by Negroes, according to the conviction records of the United States District Court.* "No

* ADMINISTRATIVE OFFICE OF THE U. S. COURTS, 1964 REPORT, Part 2(VI), reproduced in *Hearings Before the Committee on the District of Columbia of the Senate*, 89th Cong., 1st Sess., pt. 1 at 73 (1965).

figures on adult crime are broken down in New York by race; but unofficially the mayor's office makes available the estimate that 80% of all crimes in New York is committed by what are called 'non-whites'—Negroes and Puerto Ricans, generally of the late teens and early twenties" [WHITE, *THE MAKING OF THE PRESIDENT* 1964, p. 241 (1965)]. Race is not the cause of crime, the crime rates being associated with other factors which are also associated with race. But the figures indicate that these other factors, while producing a racial disproportion in the crime rate, also lead, by the same token, to a disproportion in the rate of persons whom the police reasonably suspect.

Plainly, "normal, completely fair police work" would produce the arrest or stopping of large numbers of persons in these groups [TASK FORCE REPORT: *THE POLICE*, p. 183]. The President's Commission's studies of police practices in several northern cities "found no discriminatory treatment against Negroes in comparison to whites of the same economic level" [*id.* at 164; see also *CHALLENGE OF CRIME*, pp. 99-100]. Apparently, in New York City no fewer weapons are recovered from Negroes and Puerto Ricans than from whites, in proportion to the number of frisks of persons in those groups (A39).*

It is claimed, however, that "stop and frisk" is different from all other law enforcement measures which affect members of minority groups disproportionately. Al-

* See also 2 STUDIES IN CRIME AND LAW ENFORCEMENT IN MAJOR METROPOLITAN AREAS (FIELD SURVEYS I & II), pp. 85-88 (Report of Research Study Submitted to President's Commission on Law Enforcement and Administration of Justice, 1967), quoted in brief of AELE, *amicus curiae*, pp. 15-16.

legedly, the standard of reasonable suspicion permits the patrolman improperly to consider a citizen's race as a factor in determining whether to invoke official authority. However, the standard is no different in this respect from probable cause, by which standard a patrolman may arrest persons abroad in the street, without a warrant. Application of the standard of reasonable suspicion, it is true, entails police contacts with a greater proportion of innocent persons than are apprehended by the standard of probable cause. Thus, as has been argued, more innocent Negroes will be stopped or frisked under the former test than will be taken into custody under the latter. But the same is true of innocent white persons. And the cases of abuse cited to this Court—such as the repeated stopping of an interracial couple in Los Angeles, or the instances of deliberate rudeness or patronizing by police—are irrelevant to the determination whether the theory of stop and frisk conflicts with the Fourth Amendment. Such harassment is patently wrong, and the officers who resort to it and the citizens victimized by it know that, with or without judicial or legislative approval of the theory of stop and frisk. Since the purpose of such behavior is not to obtain evidence of guilt, the only effective sanction available to the judiciary under the Fourth Amendment, exclusion of evidence obtained by an unreasonable search and seizure, is an ineffective remedy for the misconduct.

Crime is color blind. All groups want protection from crime, and all suffer from it. Members of minority groups are the main victims. For example, in the United States the rate of victimization for aggravated assault for non-whites is 87% higher than for whites, and it is 60% higher

for burglary, 250% higher for robbery, and 74% higher for theft of motor vehicles [TASK FORCE REPORT: CRIME AND ITS IMPACT—AN ASSESSMENT, p. 80]. Although such statistics are not kept by the New York City Police Department, "neighborhood-by-neighborhood statistics indicate that a large majority of violent crimes are committed within ghetto areas, such as Harlem, East New York and the precincts surrounding the Grand Concourse in the Bronx" [Zion, *Interracial Assaults*, N. Y. Times, April 18, 1967, p. 29, col. 3]. Understandably, public opinion polls show that for nonwhite Americans crime is considered one of the most important domestic problems [CHALLENGE OF CRIME, pp. 49-51; TASK FORCE REPORT: THE POLICE, p. 148]. While over-enforcement by police aggravates community tensions, so do crime and under-enforcement.* "For example, in Watts, of the 41 percent of Negroes who believed that the police were doing a 'not so good' or 'poor' job (47 percent thought the police were doing an 'excellent or pretty good job'), many cited lack of adequate protection as the basis of their opinion rather than brutality, dis-

* Cf. Barner, *Harlem Angry Over Crime*, Amsterdam News, Oct. 28, 1967, p. 1, col. 8:

"Unrest over the prevalence of violent crime in Harlem has brought demands for increased police action from several sources over the past weeks. Police have taken quick steps to cope with much of the problem.

"The area's present reputation for high crime and dope addiction, however, has caused some uptown businessmen and civic spokesmen to take a damping attitude toward proposed major government construction * * *

"Over 700 Harlem residents jammed an anti-crime rally last week at the St. Charles R. C. Church, 211 W. 141st St., proclaiming: 'We're afraid to walk the street; we're terrified in our homes.'"

courtesy or discrimination" [TASK FORCE REPORT: THE POLICE, p. 148; see also p. 183].

Even reasonable police conduct—the only kind authorized by the stop and frisk statute—will create tensions in the community. "It is not possible for the police to enforce the law and preserve the peace without incurring some hostility and resentment. This is inherent in the very nature of police work" [TASK FORCE REPORT: THE POLICE, p. 178]. Two cases occurring last year in South Harlem in the same police precinct illustrate this conclusion. On a Saturday evening, a lady resident of 122nd Street told a patrolman that two young male Negroes had just snatched her purse and fled north through an alleyway of the building where she lived. The officer stopped a youth of seventeen who was running through a housing development two blocks north, made a frisk, and returned him to the scene. The complainant was unable to make a positive identification, and the suspect was released, having been detained for ten minutes.* Perhaps, as is claimed by a friend of the Court, there is "growing dissatisfaction on the part of many Negroes, especially the young, which focuses on the police as the most visible and provocative members of the white community" (brief of N.A.A.C.P. Legal Defense Fund, *amicus curiae*, p. 67). The youth in this case might have shared the dissatisfaction. But if the officer (who had an Irish name) had not taken the proper action he did, the complainant, whose week's wages might have been in the purse, would have had far better cause to be resentful of

* Report of Stopping Accompanied by Force or Stopping Accompanied by Frisk, Form U.F. 250, April 9, 1966, Serial No. 8, 26th Precinct, N.Y.C. Police Department.

the police. In the second case, at 12:30 at night a patrolman on 133rd Street near Broadway, a street frequently used by residents of a nearby housing project on their way home from a subway station a few blocks away, observed two men for five minutes loitering on the street, and on two occasions following persons who passed by them. Suspecting a possible robbery, the officer stopped and frisked them, and learned their identities. The men, both Negroes, protested that the officer had no right to stop them.* But surely the residents of that neighborhood returning to their homes were entitled to security from a mugging or other interference.

Thus, as the District Attorney of Los Angeles County cogently suggests, blanket disapproval of the theory of stop and frisk on Fourth Amendment grounds, because of incidents of police harassment or misconduct because of race, would needlessly penalize civilians and policemen of all races for whose benefit the proper procedures are employed. The bigoted, unprofessional or unthinking policeman would not significantly alter his conduct. The upright police officer, who uses the stop and frisk procedures properly, would adhere to the Court's commandment. Since his right of self-defense by a frisk would be removed, most likely he would refrain from interfering with the suspected "enforcer" reportedly armed and abroad in a block inhabited mainly by Negroes (see p. 15, *supra*) [*cf. People v. Teams*, 18 N.Y.2d 835 (1966), *affirming* 20 A.D.2d 803, 25 A.D.2d 496 (2d Dept. 1964)], or the apparent night prowler

* Report of Stopping by Force or Stoppage Accompanied by Frisk, Form U.F. 250, October 5, 1966, Serial N. 21, 22, 26th Precinct, N.Y.C. Police Department.

on the tenement roof (see p. 3, *supra*). (In a similar incident the year before, a patrolman was shot and killed on the roof of an East Harlem tenement while investigating a report of a prowler).^{*} Since his authority of temporary detention would be stripped, he would not detain the men on the Harlem street who might be waiting to ambush passers-by returning home late at night, or the men apparently "casing" the tavern in the Puerto Rican neighborhood (see p. 14, *supra*) [*cf. People v. Rivera*, 14 N.Y.2d 441 (1964), *cert. denied* 379 U. S. 978 (1965)]. For it is in the Lower East Side, not the East 60's, in Harlem, not Sutton Place, that "stop and frisk" is and should be most often used by good police officers.

In sum, there being no demonstration that the stop and frisk statute is intrinsically unworkable or abusive, and overwhelming support for its reasonableness, voiding the statute outright on the meager hearing records presently before the Court, or upon the instances of bad conduct by policemen cited by appellants, would be unwarranted. Far from an encouragement of restraint in state law enforcement, that would be a needless rebuff of a conscientious effort by the legislature and law enforcement agencies to conform the right of every person "to be let alone" by the police with the right of all persons in the community to be let alone by robbers, burglars and other intruders upon the privacy of citizens.

^{*} N. Y. Times, May 30, 1963, p. 41, col. 1.

Conclusion

Section 180-a of the New York Code of Criminal Procedure should be upheld.

Respectfully submitted,

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Grateful acknowledgment for assistance in the preparation of the empirical material and other portions of this brief and the accompanying Appendix is extended to the following law students:

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November, 1967

A1

I

**Training Material and Regulations of New York City
Police Department on Stop and Frisk**

A

T.O.P. 202

**POLICE DEPARTMENT
CITY OF NEW YORK**

TO ALL COMMANDS: /

June 8, 1964

**Subject: INSTRUCTION OF ALL MEMBERS OF THE FORCE IN
THE PROVISIONS OF NEW LAWS DEALING WITH
"STOPPING AND FRISKING" AND "EXECUTING CER-
TAIN SEARCH WARRANTS."**

1. On July 1, 1964, two new laws, dealing with stopping persons upon reasonable suspicion of their having committed certain crimes, and with certain searches made under the authority of a search warrant, go into effect. Every member of the force is to receive instruction in the provisions of these laws prior to performing duty on July 1, 1964. This instruction will be given in accordance with the directions indicated below.

2. On Thursday, June 11, an explanation of these laws and the department policy in connection with their enforcement will be given at the Police Academy, room 400, from 9 a.m. to 12 Noon.

a. Each commanding officer listed below shall designate superior officers within his command as training officers, and direct them to attend this session at the Police Academy:

<i>Commanding Officer</i>	<i>Maximum Number</i>
Safety Division	8
Auxiliary Services Division	3
Youth Division	5
Planning Bureau	1
P.C.C.I.U.	1
C.I.I.U.	1
Narcotics Bureau	1
Central Office Bureaus and Squads	2
Emergency Service Division	5
Tactical Patrol Force	1
License Division	1

b. Each patrol precinct commander shall direct his Unit-Training Sergeant to attend this session.

3. Training for all members of the force shall be conducted as follows:

a. Unit-Training Sergeant shall conduct classes in their precincts from 4 p.m. to 4:30 p.m. for squads indicated:

<i>Date</i>	<i>Day of Week</i>	<i>Squad</i>
June 15	Monday	12, 13
June 16	Tuesday	14, 15
June 17	Wednesday	16, 17
June 18*	Thursday	18, 19
June 22	Monday	20, 1
June 23	Tuesday	2, 3
June 24	Wednesday	4, 5
June 25	Monday	6, 7
June 30	Tuesday	8, 9
July 1	Wednesday	10, 11

* On Thursday, June 18, the instruction will be from 4:30 p.m. to 5 p.m. instead of 4 p.m. to 4:30 p.m. This is done to avoid conflict with the Unit-Training television program.

b. Commanding officers of patrol boroughs and divisions shall direct members of their commands, including plainclothes patrolmen, to attend one of the training classes conducted by a Precinct Unit-Training Sergeant.

d. [sic] Commanding officers listed in paragraph 2a shall direct their training officers to give instruction of approximately 30 minutes duration on these new laws to all members of their commands. This instruction shall be scheduled in a manner to cause least interference with police service.

e. The Commanding Officer, Police Academy, shall direct that 30-minute training sessions on these new laws be given at the Police Academy on June 15, 22 and 29 at 9 a.m. and 1 p.m., for members of the Personnel Bureau and other units of the department not otherwise provided for in this order. Commanding officers of units concerned shall arrange for their members to attend one of these sessions.

4. Each commanding officer is responsible that each member of his command is instructed in the provisions of these new laws. Where members are being trained by other than members of their own commands, they shall be supplied with a Detail Roster, U.F. 30, in duplicate, to be presented to the training officer concerned. The training officer will initial the duplicate copy to verify the attendance of those listed; the duplicate will be returned to the command concerned, the original, retained.

5. Superior officers shall frequently test the knowledge of subordinates concerning these new laws. Appropriate instruction shall be given, as necessary, to assure full un-

derstanding of these laws and the department policy regarding their enforcement. Superior officers are responsible that these new procedures are carried out in strict conformity with department instructions.

By DIRECTION OF THE POLICE COMMISSIONER.

LAWRENCE J. McKEARNEY
Chief Inspector

Circular No. 25

INSTRUCTIONS TO MEMBERS OF THE FORCE
CONCERNING THE "STOP AND FRISK" (CHAPTER 86) AND
"NO KNOCK" (CHAPTER 85) LAWS

Two new statutes, with major impact on police authority, become effective in New York State on July 1, 1964.

These laws, if properly utilized, can be of considerable aid in safeguarding our communities. Their passage resulted in part from the combined strenuous efforts expended by New York State's various law enforcement agencies. As is the case with all other law enforcement powers, whether or not these sorely-needed enactments will withstand the attacks that will be made upon their constitutionality, and will stand as laws upon the books of this State, will depend in large measure upon the fashion in which they are carried out. They should be enforced with full recognition that their purposes are to protect the community, while simultaneously protecting and treating fairly all persons in it.

Every member of the force has the responsibility of seeing to it that the powers conferred by these new statutes are used to further those purposes for which they were enacted. Some guidelines for proper conduct pursuant to these statutes are set forth herein:

I THE "STOP-AND-FRISK" LAW (Chapter 86, Laws of 1964)

The new statute, which becomes §180-a of the Code of Criminal Procedure, provides as follows:

§180-a. Temporary questioning of persons in public places; search for weapons.

1. A police officer may stop any person abroad in a public place whom he reasonably suspects is committing, has committed or is about to commit a felony or any of the crimes specified in section five hundred fifty-two of this chapter, and may demand of him his name, address and an explanation of his actions.

2. When a police officer has stopped a person for questioning pursuant to this section and reasonably suspects that he is in danger of life or limb, he may search such person for a dangerous weapon. If the police officer finds such a weapon or any other thing the possession of which may constitute a crime, he may take and keep it until the completion of the questioning, at which time he shall either return it, if lawfully possessed, or arrest such person.

A. GENERAL PRINCIPLES:

1. The new law does not permit an officer to stop just any passer-by and search him, nor does it allow the search of any person merely because he has a criminal record.

2. The new law does not permit the stopping and searching of any person found in the vicinity of a crime scene, merely because he happens to be there.

3. The new law does not dispense with the need for adequate observation and investigation, depending upon all the circumstances, before a stop is made.

4. No officer should stop anyone, under the new law, unless he is prepared to explain, with particularity, his reasons for stopping such person.

5. No officer should stop anyone, under the new law, unless the crime he reasonably suspects is a felony or one of those misdemeanors listed in §552 of the Code of Criminal Procedure.

6. When a person is stopped under the new law, the officer—if not in uniform—must properly and promptly identify himself to the person stopped.

7. Not everyone stopped may be searched; searches are only permitted when the officer reasonably suspects that he is in danger.

8. The right to stop provided in the new law in no way changes the previously existing authority of an officer to make an arrest without an arrest warrant, as provided by §177 of the Code of Criminal Procedure. The new rights to stop and to search, as defined in the new statute, are separate and distinct from the established right to arrest, as provided by existing law, and to make a complete search incident to such arrest.

9. Whether or not an arrest follows a stopping under the new law, whenever any force is used in stopping the suspect, or whenever any frisk or search is made, a written report shall be made to the officer's superior officer. Form for such reports, together with instructions for their use, will be distributed with separate orders.

B. THE RIGHT TO "STOP."

1. "stop":

The new statute gives the officer the right to stop a person under the indicated circumstances. If the sus-

pect refuses to stop, the officer may use reasonable force, but only by use of his body, arms and legs. He may not make use of a weapon or nightstick in any fashion. (Of course, if there is an assault on the officer or other circumstances sufficient to justify an arrest, the officer may use necessary force to effect that arrest.)

2. "abroad in a public place":

- a. For the purposes of practical enforcement procedures, this phrase is viewed as being restricted to public highways and streets, beaches and parks (to include outdoor facilities open to the public even though privately owned), depots, stations, and public transportation facilities.
- b. For the purpose of practical enforcement procedures, this phrase is viewed as not including the public portions of private buildings such as hotel lobbies, moving picture theatres, licensed premises, etc.
- c. Definitions of the words "public place" as found in other laws, such as those dealing with disorderly conduct, are not to be substituted for the strict definition of "abroad in a public place" as outlined above.

3. "whom he reasonably suspects":

- a. The words "reasonably suspects" are not to be lightly regarded; they are not just an incidental phrase; they have real meaning. "Reasonable suspicion" is clearly more than "mere suspicion."

At the same time it is something less than "reasonable ground for believing" that a crime is being committed, as is necessary for an arrest.

- b. No precise definition of "reasonably suspects" can be provided, other than that it is such a combination of factors as would merit the sound and objective suspicions of a properly alert law enforcement officer, performing his sworn duties. Among the factors to be considered in determining whether or not there is "reasonable suspicion" are:

- i. The demeanor of the suspect.
- ii. The gait and manner of the suspect.
- iii. Any knowledge the officer may have of the suspect's background or character.
- iv. Whether the suspect is carrying anything, and what he is carrying.
- v. The manner in which the suspect is dressed, including bulges in clothing—when considered in light of all of the other factors.
- vi. The time of the day or night the suspect is observed.
- vii. Any overheard conversation of the suspect.
- viii. The particular streets and areas involved.
- ix. Any information received from third persons, whether they are known or unknown.
- x. Whether the suspect is consorting with others whose conduct is "reasonably suspect."

- xi. The suspect's proximity to known criminal conduct.

(This listing is not meant to be all inclusive.)

- c. "Reasonable suspicion" of any crime at all does not afford a basis for stopping under the new law; there must be reasonable suspicion that the suspect is committing, has committed, or is about to commit either any felony or one of those misdemeanors enumerated in §552 of the Code of Criminal Procedure. (These misdemeanors are weapons crimes, burglar's tools, receiving stolen property, unlawful entry, escape, impairing, carnal abuse, indecent exposure, obscenity and other indecency provisions, sodomy, rape, narcotics, amphetamines and hypodermic needles.) Suspicion of disorderly conduct, an offense, is not for the purpose of practical enforcement procedures a basis for stopping:

C. THE RIGHT TO "QUESTION".

1. No questions are to be asked until the officer has, either by being in uniform or by showing his shield and stating he is a police officer, identified himself.
2. Promptly thereafter, the suspect should be questioned (and frisked, when appropriate) in the immediate area in which he was stopped.
3. Should the suspect refuse to answer the officer's questions; the officer cannot compel an answer and should not attempt to do so. The suspect's refusal to answer shall not be considered as an element by the officer in determining whether or not there is a basis for an arrest.

4. In ascertaining "his name" from the suspect, the officer may request to see verification of his identity, but a person shall not be compelled to produce such verification.

5. If the suspect does answer, and his answers appear to be false or unsatisfactory, the officer may question further. Answers of this nature may serve as an element in determining whether a basis for arrest exists. (But if an officer determines that an answer is "unsatisfactory" and relies upon this in part to sustain his arrest, he should be able to explain with particularity the manner in which it is "unsatisfactory.")

6. If, after he has been stopped and the officer has identified himself, the suspect attempts to flee from the officer, this fact may be an element in determining whether a basis for arrest exists. However, the officer should not resort to the use of a weapon or other extraordinary means to stop the flight unless he has information which now leads him to reasonably believe that the suspect has committed a felony.

D. THE RIGHT TO "SEARCH."

1. Clearly no right to search exists unless there is a right to stop.

2. Nor is a search lawful in every case in which a right to stop exists. A search only justified under the new law when the officer reasonably suspects that he is in danger. This claim is not to be used as a pretext for obtaining evidence. In instances in which evidence is produced as a result of a search, the superior officers, the prosecutors, and—it is anticipated—the courts, will scrutinize particularly

closely all the circumstances relied upon for justifying the stopping and searching.

3. No search is appropriate unless the officer "reasonably suspects that he is in danger." Among the factors that may be considered in determining whether to search are:

- a. Nature of the suspected crime, and whether it involved the use of a weapon or violence.
- b. The presence or absence of assistance to the officer, and the number of suspects being stopped.
- c. The time of the day or night.
- d. Prior knowledge of the suspects' record and reputation.
- e. The sex of the suspect.
- f. The demeanor and seeming agility of the suspect, and whether his clothes so bulge as to be indicative of concealed weapons.

(This listing is not meant to be all inclusive.)

4: Initially, once the determination has been made that the officer may be in danger, all that is necessary is a frisk—an external feeling of clothing—such as would reveal a weapon of immediate danger to the officer.

5. A search of the suspect's clothing and pockets should not be made unless something is felt by this frisk—such as a hard object that feels as if it may be a weapon. In such event, the officer may search that portion of the suspect's clothing to uncover the article that was felt.

6. If the suspect is carrying an object such as a handbag, suitcase, sack, etc. which may conceal a weapon, the officer should not open that item, but should see that it is placed out of reach of the suspect so that its presence will not represent any immediate danger to the officer.

E. AN EXAMPLE:

An example may help to illustrate. Assume that a mugging has just occurred. The officer questions the victim. She says that her pocketbook was taken and she gives a description of the suspect stating, among other things, that he is about six feet tall and was wearing a brown leather windbreaker. While the victim is receiving medical treatment, the officer starts a search of the area. He sees a man hurrying down a dark street. The man's hand is clutching at a bulge under his brown windbreaker, and he glances back at the officer repeatedly. The suspect meets the description of the perpetrator except for one discrepancy: he is only five feet tall.

The officer does not have reasonable grounds to arrest the suspect for his description is clearly inconsistent with the victim's estimate of the perpetrator's height. However, from the officer's experience he realizes that victims of crime, in an excited condition, often give descriptions which are not correct in every detail. Although he lacks reasonable grounds to make an arrest, from all of the circumstances the officer "reasonably suspects" that the man he has spotted has committed the crime. Under the new law, the officer may stop this person, and may ask for his identification and an explanation of his actions. And because the crime involved violence and the suspect's windbreaker seems to conceal unnatural bulges, a frisk may be in order.

[Remainder of circular concerns another statute.]

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C

T. O. P. 238

POLICE DEPARTMENT
CITY OF NEW YORK

July 8, 1964

TO ALL COMMANDS:

Subject: NEW FORM U.F. 250 (REPORT OF STOPPING BY FORCE OR STOPPING ACCOMPANIED BY FRISK) WHEN AND HOW PREPARED.

1. Circular No. 25, c.s., subdivision A, paragraph 9, directs that a written report be made to an officer's superior whenever, under the new stop and frisk law, any force is used in stopping a suspect, or whenever any frisk or search of the suspect is made. Accordingly, Form U.F. 250 (Report of Stopping By Force or Stopping Accompanied by Frisk) is hereby established.

2. An initial supply of new Form U.F. 250 is presently being distributed to all commands to meet immediate needs. Commanding officers concerned shall cause these blank forms to be furnished to all members of their commands and shall arrange for the maintenance of a reserve supply in accordance with the needs of the command. A second distribution will be made as soon as additional printed supplies become available.

3. Form U.F. 250 shall be prepared in duplicate by a member of the force *each* time he stops a person under the authority of the law *AND* the stopping is done by the use of force *OR* the person stopped is either frisked or frisked and searched.

4. Form U.F. 250 shall be prepared for *EACH PERSON* so stopped.

5. The member concerned shall immediately inform the desk officer of the precinct of occurrence of the facts concerning a stopping by force, etc., and submit completed Form U.F. 250 in duplicate to the desk officer of such patrol precinct.

6. In patrol precincts, a file of Forms U.F. 250 so submitted shall be maintained at the desk, available for ready reference by commanding officers, supervisory officers and members of the Detective Division concerned.

7. Commanding and Supervisory officers concerned shall frequently examine Forms U. F. 250 submitted and on file so that they may issue appropriate orders and instructions as may be required.

8. The desk officer to whom completed Forms U.F. 250 are submitted shall examine and sign them and, after taking whatever immediate action is necessary, he shall bring them to the attention of his commanding officer.

9. Duplicate copy of Form U.F. 250 shall be forwarded daily with morning report to the Statistical and Records Bureau. If the member concerned is not assigned to the patrol precinct, a triplicate copy of the report shall be prepared and forwarded to his commanding officer through department mail.

10. Each Form U.F. 250 shall be serially numbered in the upper right corner over the caption "Pct" beginning with serial #1 each year.

11. In patrol precincts, the Unit Training Officer, and in other commands, a superior designated by the commanding officer, shall be *specifically responsible* for reviewing each Form U.F. 250 submitted and where, in his judgment, it is required he shall hold a critique with the member of the force concerned. With the approval of his commanding officer, a training officer shall, if his study of reports submitted indicates the need therefor, further instruct the entire command in the manner of exercising the legal authority outlined in Circular No. 25 c.s.

12. Members of the force required to maintain a memorandum book shall enter therein the details pertaining to each exercise of authority granted under the new statute. (See 3/26.0-78.0 of the Rules and Procedures).

13. Every member of the force shall be thoroughly familiar with the provisions of this law (See Cir. 25, c.s.) and the procedures for its implementation. Instructions received from the designated training officer shall be carefully followed.

BY DIRECTION OF THE ACTING POLICE COMMISSIONER.

LAWRENCE J. McKEARNEY
Chief Inspector

TIME	and DATE OF STOPPING	PERIOD OF OBSERVATION PRIOR TO STOPPING	LOCATION	PCT.	POST	KIND OF PUBLIC PLACE
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FACTORS WHICH CAUSED OFFICER TO REASONABLY SUSPECT PERSON STOPPED (Include information from third persons and their identity, if known)

CRIME SUSPECTED	* How Long was Person Stopped		REMARKS BY PERSON STOPPED	
OFFICER IN UNIFORM	<input type="checkbox"/> YES <input type="checkbox"/> NO	IF NO, HOW IDENTIFIED <input type="checkbox"/> SHIELD <input type="checkbox"/> I.D. CARD <input type="checkbox"/> BOTH	WAS FORCE USED <input type="checkbox"/> YES <input type="checkbox"/> NO	IF YES, DESCRIBE <input type="checkbox"/> YES <input type="checkbox"/> NO
WAS PERSON FRISKED	<input type="checkbox"/> YES <input type="checkbox"/> NO	WAS SEARCH INSIDE CLOTHES MADE <input type="checkbox"/> YES <input type="checkbox"/> NO	IF YES, DESCRIBE WHERE MADE AND BASIS FOR INSIDE SEARCH	
Was Weapon Found	<input type="checkbox"/> YES <input type="checkbox"/> NO	IF YES, DESCRIBE Was Other Contraband Found <input type="checkbox"/> YES <input type="checkbox"/> NO	IF YES, DESCRIBE <input type="checkbox"/> YES <input type="checkbox"/> NO	
NAME OF PERSON STOPPED (if given) and ADDRESS				

DESCRIPTION	SEX	COLOR	AGE	HEIGHT	WEIGHT	HAIR	EYES	BUILD	OTHER (Describe)
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IF PERSON STOPPED IS SUBSEQUENTLY ARRESTED, INCLUDE ADDITIONAL FACTORS WHICH LED TO ARREST

CRIME CHARGED	CONTRABAND FOUND IN POST-ARREST SEARCH	COURT IN WHICH CASE PENDING				
RANK	SIGNATURE OF REPORTING OFFICER	SHIELD	COMMAND	RANK	SIGNATURE OF SUPERIOR OFFICER	COMMAND

REPORT OF STOPPING BY FORCE OR STOPPING ACCOMPANIED BY FRISK

U.F. 250 (7-64)

A18

D

UTM-5-66

TELECAST TOPIC: "STOP AND FRISK"

STATION: W.N.Y.C.—Channel 31 (U.H.F.)

TIME: 4:00 to 4:30 P.M., May 2, 1966
through May 27, 1966, exclusive
of Saturdays and Sundays.

OBJECTIVE:

1. To re-instruct members of the force in the provisions of the "stop and frisk" statute.
2. To insure the cautious, judicious application of the law and related procedures.

SCOPE:

Limited to the provisions and meaning of terms in section 180-a of the Code of Criminal Procedure and the preparation of the U.F. 250 form.

DIGEST OF TELECAST:

- A. Address by the Deputy Commissioner in charge of Legal Matters.
- B. *The "stop and frisk" law:*
 - Provisions
 - Conditions necessary for "stop"
 - Conditions necessary for "frisk"
 - Explanation of terms
- C. *The U.F. 250 form:*
 - When to prepare
 - How to prepare

HINTS FOR INSTRUCTORS:

1. Research precinct records as to activity and use of this law and report.
2. References: Circular 25, s. 1964; T.O.P. 238, s. 1964; Spring 3100, April 1965 and Sept. 1964.
3. Test knowledge with simulated situations and get class participation.

STOP and FRISK.

Two years have elapsed since the "Stop and Frisk" law went into effect. Prior to the effective date of the law, July 1, 1964, every member of the force received training in the fine points of the new statute so that everyone would understand the new powers granted to us, and the limitations placed upon those powers.

The monthly average of U.F. 250's submitted by members of the force since July 1964 shows a gradual decline. This decline seems to indicate that members of the force may be unsure of themselves in the application of the provisions of the law, or possibly, that they are ignoring the provisions of T.O.P. 238 s. 1964 relative to the preparation of form U.F. 250.

For these reasons, this cycle of Unit Training will be devoted to a review of the "Stop and Frisk" law and the preparation of the U.F. 250 form. It must be emphasized that our purpose is not to press a campaign for more use of the law, but rather to re-instruct members of the force in the provisions and the cautious, judicious application of the law and related procedures.

THE "STOP AND FRISK" LAW
(Chapter 86, Laws of 1964)

[Repeats instructions in Circular No. 25, *supra*]

FORM U.F. 250

Circular 25, series 1964 specified that *whether or not* an arrest follows a stopping under the "stop and frisk" law, a written report must be made if certain conditions are present. The department provided a new form which is known as the U.F. 250 (Report of Stopping by Force or Stopping Accompanied by Frisk). The U.F. 250 must be prepared in duplicate and submitted to the desk officer by the officer effecting the "stop" whenever the "stop" involves:

- FORCE — to stop
- a frisk or
- a search

No U.F. 250, then, is needed in a simple "stop" where the one questioned halts as requested and no frisk or search is made.

Where force was used *or* a frisk *or* a search was made, the officer should prepare the form U.F. 250, in duplicate, in the following manner:

- Enter time and date suspect was stopped
- How long did the officer keep the suspect under observation prior to stopping him.

- Enter the location whereat the stop was made and the precinct, post and the kind of public place (Sec. 180a C.C.P. states that we may stop the party "*abroad in a public place*" and this includes any streets, public highways, beaches, parks, stations and so forth).
- The next caption relates to the circumstances that caused the reporting officer to become reasonably suspicious. The suspicion must be that the suspect was committing, had committed or was about to commit a Felony or one of the crimes in 552 of the code.
- What felony or crime in 552 did the officer suspect? Enter under such caption.
- Enter the length of time the suspect was delayed.
- Include any remarks made to the reporting officer.
- Check whether officer was in uniform or not.
- If not in uniform, how did he identify himself? Check whether by shield, L.D. card or both.
- Check the box as to whether or not officer had to use force in stopping person. If "yes" describe briefly, telling what was done or occurred.
- Check whether person was frisked or not and whether a search, inside clothes, was made.
- If a search inside clothes was made, the officer should describe where the search was made, including location of search and part of body or clothing

searched and the reason he suspected he was in danger. (The stop and the search should always be made at the same location)

- Check if a weapon was found. If it was, it should be described briefly.
- The caption re contraband other than weapons should be checked "Yes" or "No" and contraband (forbidden by law) described, if the answer is "yes".
- The name of the person stopped, if obtained, and his address should be entered. (Note: the suspect cannot be compelled to answer if he refuses to do so.)
- The description of the suspect should be entered under the captions sex, color, age, height, weight, hair, eyes, build, and the description of clothing or peculiarities such as tattoos, moustache, etc., entered under "other."
- If the person that was stopped is arrested subsequent to the stop, the officer should spell out the circumstances that led up to the arrest.
- The crime the suspect was charged with, contraband found in the post-arrest search and the court in which the case is pending should be entered.
- Finally, the officer should sign the duplicate report with his rank, signature, shield and command and submit it to the desk officer of such patrol precinct.

So much for the actual preparation of the form U.F. 250 by the officer. It should be remembered that *immediately* after the "stop" the officer concerned should inform the desk officer of the precinct of occurrence concerning a stopping by force, etc. and make necessary memo book entries.

The desk officer to whom completed Forms U.F. 250 are submitted should examine and sign them, *being sure to enter the precinct serial number over the caption "Pct" in the upper right corner.* After taking whatever immediate action is necessary, the desk officer is charged with bringing the report to the attention of his commanding officer.

In patrol precincts, the *Unit Training Officer*, and in other commands, a superior designated by the commanding officer, is *specifically responsible* for reviewing each Form U.F. 250 submitted and where, in his judgment, it is required, he should hold a critique with the members of the force concerned. Further instruction in the manner of exercising this legal authority should be given when study of reports indicates a need therefor.

Summation

This law, Section 180-a of the Code of Criminal Procedure, if properly utilized, can be of considerable aid in safeguarding the community. The alert officer should be cognizant of it as a useful tool of his profession which, if used wisely, can be a definite precedent for legislation which will further broaden police power to cope with lawlessness.

Every member of the force has the responsibility of seeing to it that the power conferred by this statute is used for the purposes for which it was enacted, namely to protect the community while simultaneously protecting and treating fairly all persons in it. There have been no adverse decisions in the almost two years of utilization of the statute, and if the same judicious and responsible police action is taken in the future, with adequate, complete and legible reports submitted, there should be no fear of repercussions. The public and law enforcement will be the beneficiary.

[Included in this training material is a copy of Form U.F. 250, reproduced herein at A17, *supra*.]

A25

E

LESSON PLAN CODE II F 6

SEQ: 035

POLICE DEPARTMENT—CITY OF NEW YORK

RECRUIT TRAINING SCHOOL

LESSON TITLE: SPECIAL CASES OF ARREST—PART 1

SCOPE: STOP & FRISK LAW, detention and taking into custody of children, material witnesses and violations of parole.

OBJECTIVE: To acquaint the recruit with special arrest procedures which are not consistent with the general laws of arrest.

TRAINING AIDS

Chalkboard

Vu-Graph

ISSUE MATERIAL

U.F. 250

Digest (IIF6 & 7)

BIBLIOGRAPHY

Recruit Study Assignment

Cir 25 a64; T.O.P. 238 s64

TOP 224-1 s66

EDITED January, 1967

BY Lt. Salomon

6 Pages

I. INTRODUCTION

50'

- A. Today we will continue with the course of study in arrest procedures. From the previous lessons in this course you have learned the law of arrest, the making of arrests with or without warrants and the lawful use of force. Today we shall discuss some problems in connection with arrests which are not governed by the procedures previously discussed. The special procedures covered in this lesson have been instituted to cope with difficult and unique enforcement problems.

II. BODY

45'

A. "STOP & Frisk" Law

180a C.C.P.
Cir # 25 s 64

1. A police officer
2. May stop any person
 - a. to stop the person the police officer may use reasonable force i.e. arms, legs, body *not* nightstick or weapon
3. abroad in *public* place
 - a. public place includes streets, parks and beaches, depots, stations and public transit facilities. It does *not* include theatres, hotel lobbies, licensed premises

Time Remarks/References

- b. the definition of a public place for purposes of this section is substantially different than in other sections of law
- 4. whom he *reasonably suspects*, is committing, has committed or is about to commit a felony or any crime in 552 C.C.P.
 - a. *Does not include violations in 552 C.C.P.*
- 5. may demand of him his name, address and *an* explanation of his actions
 - a. if officer not in uniform must show shield and state that he is police officer
 - b. cannot compel answers and this failure to answer not basis of arrest
 - c. false or unsatisfactory answers may be in part the basis of an arrest however officer must show the manner in which answer was unsatisfactory
- 6. If police officer reasonably suspects that his life or limb is in danger, he may search such person for a dangerous weapon.

Note: Reasonable suspicion is more than mere suspicion but less than reasonable grounds for arrest

Note: Right to search *only* follows a valid stop. The frisk takes place where questioning began

	Time	Remarks/References
a. exterior frisk is sufficient to reveal any object which would necessitate a full search		
7. If officer finds such a weapon or any other thing the possession of which may constitute a crime he may take and keep it until completion of the questioning at which time he shall either return it, if lawfully possessed, or arrest such person.		
8. a. U.F. 250 must be prepared each time a member of the force stops a person AND the stopping is accomplished by the use of force OR the person stopped is either frisked or frisked and searched. U.F. 250 prepared for each person so stopped.		T.O.P. 238 s 64
b. The member of the force must immediately inform the D.O. of the precinct of occurrence of the facts of such an occurrence and submit U.F. 250 in duplicate (triplicate if not assigned to reporting command).		

F

POLICE DEPARTMENT

CITY OF NEW YORK

Office of the Police Commissioner

New York, March 3, 1967.

CIRCULAR No. 3

1. The following is published for the information and guidance of all concerned.

COURT DECISIONS RE: "THE STOP AND FRISK LAW"

The Fourth Amendment of the Constitution of the United States prohibits unreasonable searches and seizures. This amendment, as construed by the Court, authorizes the search of a person or place; 1. when incidental to lawful arrest; 2. when done pursuant to a valid search warrant; 3. when done with the consent of the person or persons concerned.

The Courts enforce the provisions of this Constitutional Amendment by excluding from use as evidence, anything that is obtained as a result of an "unreasonable search and seizure."

In 1964, the New York State Legislature enacted Section 180-a of the Code of Criminal Procedure, the so-called "Stop and Frisk Law." This section authorizes the temporary questioning of persons in public places and under certain circumstances a search of that person for weapons.

Section 180-a, Code of Criminal Procedure, provides as follows:

"§180-a. Temporary questioning of persons in public places; search for weapons.

"1. A police officer may stop any person abroad in a public place whom he reasonably suspects is committing, has committed or is about to commit a felony or any of the crimes specified in section five hundred fifty-two of this chapter, and may demand of him his name, address and an explanation of his actions.

"2. When a police officer has stopped a person for questioning pursuant to this section and reasonably suspects that he is in danger of life or limb, he may search such person for a dangerous weapon. If the police officer finds such a weapon or any other thing the possession of which may constitute a crime, he may take and keep it until the completion of the questioning, at which time he shall either return it, if lawfully possessed, or arrest such person."

In July 1966 the Court of Appeals rejected an attack on the constitutionality of the above cited statute and ruled that the law provided sufficient safeguards which, if properly applied, do not violate the Fourth Amendment's prohibition against "unreasonable searches and seizures." (People v. Peters, 18 NY 2d 238)

In this case a New York City policeman, who lived in the city of Mount Vernon on the sixth floor of an apartment house which was served by an elevator, heard a noise at his door one afternoon, looked through a peephole in the door and saw two men tiptoeing about the hallway. He telephoned the Mount Vernon police, got his gun and returned to the door where he observed the men tiptoeing toward the stairway. He slammed his door and followed them. He apprehended one of them, the defendant, whom he did not recognize as a tenant, on the stairs. The policeman

asked him what he was doing there and defendant claimed he was looking for a girl friend, but refused to identify her because, he said, she was married. Thereupon the policeman, who was not in uniform, frisked defendant for a weapon by tapping his groin pockets and under his arms. He felt something hard which could have been a knife and withdrew from the right pants pocket an unsealed opaque plastic envelope which upon examination was found to contain six picks, two Allen wrenches with the short leg of each filed down to a screwdriver edge and a tension bar. He recognized these as burglar's tools. He took defendant down to the manager's office and turned him and the envelope over to the Mount Vernon police. Following defendant's indictment for possession of burglar's tools (Penal Law, §408), his motions to suppress the seized evidence and dismiss the indictment were properly denied, and then, on his plea of guilty, he was properly convicted.

The Court held the stopping, inquiring and frisking and the resultant seizure were lawful, both under case law (People v. Rivera, 14 NY 2d 441) and under Section 180-a of the Code of Criminal Procedure.

Under Section 180-a of the Code of Criminal Procedure, such stopping, inquiring and frisking do not constitute an arrest. The statutory standard—reasonable suspicion—may be based on facts and circumstances of which a policeman has reasonably trustworthy information and upon his experienced appraisal of the appearance of criminal activity. Finally, before he may arrest the suspect and seize evidence from his person, he must have reasonable or probable cause. On the scale of absolute knowledge, reasonable suspicion is somewhat below probable cause and is equally objective.

Section 180-a of the Code of Criminal Procedure does not authorize "unreasonable searches and seizures" (U. S. Const., 4th Amdt.); indeed, there is not much difference between the statutory standard and the standard used prior to the statute in *People v. Rivera* (supra).

Hallways and stairways of multiple dwellings are public places within the intendment of Section 180-a of the Code of Criminal Procedure.

In a separate case (*People v. Sibron*, 18 NY 2d 603) decided on the same day, the Court of Appeals without writing an opinion, also affirmed a conviction, relying on Section 180-a, CCP, in a case where a police officer, who had defendant under observation for several hours, observed the defendant talking to various persons known to the officer to be narcotics addicts. The officer approached the defendant and said that the defendant knew what the officer was looking for and the defendant then reached into his pocket. The officer put his hand into the defendant's pocket and intercepted his hand and found packets of heroin in the defendant's hand. The officer, by putting his hand into the defendant's pocket was acting reasonably in order to insure his own safety.

Attention is called to the provisions of Circular Order 25, June 26, 1964 which gives detailed instructions as to the implementation of the Stop and Frisk Law. It is clear that if this law is properly applied it can be of great benefit to law enforcement. Abuse of the law, however, may result in adverse decisions which may seriously limit the application of this statute.

Commanding officers are responsible that members of the force are instructed as to the contents of this bulletin.

Legal Bulletin 67-1

HOWARD R. LEARY,
Police Commissioner

II

Use of Stop and Frisk by New York City Police Department, as Reported in 1600 "U.F. 250" Reports

The following data have been compiled from the approximately 1600 "U.F. 250" forms which have been filed with the New York City Police Department between July 1, 1964 (the effective date of Section 180-a of the New York Code of Criminal Procedure) and May 31, 1967. The forms do not cover all instances when the statute has been applied. Police regulations provide that these forms are to be filled out not for every stop, but whenever an officer either stops a person by force,* or frisks a suspect. Moreover, it may be presumed that the form is not filled out every time it is required. This appears to have been especially true during the first two years in which the statute was in effect (A19). Undoubtedly, there were cases when the suspect's silence precluded filling out a form satisfactorily. In addition, many of the responses in the forms are ambiguous, or incomplete. Illustrative cases have been gleaned, however, and described in the brief.

* The "force" permitted in effecting a stop of a suspect who refuses to stop is reasonable force, by use of the hands, body or legs. Use of a weapon or nightstick is forbidden by the instructions (A7-8, A11, A17, A26).

A

**Statistical Summary of Reported Stops Accompanied by
Either Force or Frisk***

	<i>TOTAL</i> <i>(July 1, 1966- May 31, 1967)</i>	<i>1964</i> <i>(6 mo.)</i>	<i>1965</i>	<i>1966</i>	<i>1967</i> <i>(5 mo.)</i>
Persons stopped by force or frisked	1617	195	272	675	475
Persons frisked (includes undetermined number frisked after arrest)	1288	159	218	508	393
Persons stopped by force not frisked	329	36	54	167	182
Persons searched "inside clothes" (includes unde- termined number searched after arrest)	418	90	85	127	116
Persons arrested (booked)	168	50	35	51	32

* This information was supplied by the Legal Bureau of the New York City Police Department, and was compiled from the approximately 1600 "U.F. 250" reports filed as of May 31, 1967 (see A17).

B

Crimes Suspected by Officers*

Crimes included in N. Y. Code Crim. Proc. §180-a:

Grand Larceny (incl. auto), receiving stolen property	437
Burglary, unlawful entry	434
Robbery	359
Weapons	232
Narcotics	194
Felonious assault	84
Rape	31
Other sex offenses	15
Homicide	13
Other	18

Crimes possibly included in §180-a, depending whether a felony was involved:

"Assault"	51
Gambling	24
"Gang fight"	4
Other	8

Crimes or Offenses not included in §180-a:

Malicious mischief	23
Petit larceny	19
Loitering	4
Other	12

* This information was compiled by *amicus curiae*. When a report listed more than one crime suspected, all crimes listed were included in the totals.

Items Disclosed*

Persons frisked (includes undetermined
number frisked after arrest) 1288

Persons searched (includes undetermined
number searched after arrest) 418

<i>Item</i>	<i>Number of persons</i>
Gun	42
Knife—person arrested	28
Knife—no arrest was made	11
Imitation pistol, air pistol**	11
Bullets	4
Blackjack	1
Narcotics	24
Hypo. needle, etc.	11
Stolen goods	18
Burglar's tools	10
Gambling slips	9
Other	26
Total	195

* This information was compiled by *amicus curiae*. While most of the items were found before the suspect was taken into custody, in some instances the material apparently was disclosed by a search incident to arrest, and in others the reports did not make clear when the contraband was found.

** Violation of N. Y. C. Admin. Code §§436.5.0(b), (g), prosecuted by summons.

D

Places Where Stops Occurred*

Street	1204
Residential building**	110
Bar, restaurant, hotel	96
Store	44
Park	41
Bus, subway train or station	35
Amusement or shopping area	15
Alley, lot	15
Railroad station or bus terminal	13
School	6
Office	5
Other	30

* This information was compiled by *amicus curiae*.

** Hallways: 61; unclear from report, probably hallways: 21; lobbys: 11; roof: 9; basement: 4; inside apartment: 2; stairway: 1; fire escape: 1.

E

Times When Stops Occurred*

12 midnight - 3:00 a.m.	346
3:00 - 6:00 a.m.	151
6:00 - 9:00 a.m.	44
9:00 - 12 noon	106
12:00 - 3:00 p.m.	194
3:00 - 6:00 p.m.	170
6:00 - 9:00 p.m.	283
9:00 - 12 midnight	300
Total	1594
6 p.m. - 6 a.m.	1080
6 a.m. - 6 p.m.	514

* This information was compiled by *amicus curiae*.

Stops, Frisks and Recovery of Weapons by Race of Suspect

The following information was compiled by *amicus curiae*. The statistics are merely approximations. The U.F. 250 form has a space for listing the "color" of the person stopped by force or frisked. Unavoidably, the classification by the officers was arbitrary in many instances. The reports listed approximately 942 suspects as Negro and 675 as white, but it was obvious that many in the latter category were Puerto Ricans, a group comprising about 8% of the population of New York City. Therefore, the reports listing the suspects as white were analyzed by *amicus*, and suspects with Spanish names were separated and classified arbitrarily as white Puerto Ricans. It was impossible to determine by race the percentage of persons stopped who are frisked, since the U.F. 250 reports do not include all stops, but merely stops accompanied by force or a frisk.

	Negro	White (excludes Puerto Ricans)	Puerto Rican ("White")
% of N.Y.C. population, 1960			
U. S. census	14.0	77.5	7.9
Stopped by force or frisked	942	463	212
% of all persons stopped by force or frisked	58.2	28.6	13.1
Frisked (includes some post- arrest)	797	302	189
% of all persons frisked	61.1	23.4	14.6
Weapons found (guns and knives)	41*	15**	24†
% of all weapons found	51.3*	18.8**	30.0†
% of persons in this group frisked who had weapons	5.1*	5.0**	12.7†

* Excludes 8 simulated guns.

** Excludes 1 simulated gun.

† Excludes 2 simulated guns.

G

Ages of Suspects*

It has been feared that the authority to stop and frisk leads to discrimination against youths. The same considerations discussed above in the brief as to the race of the suspects apply to the ages of the suspects. The high crime rate among youths [TASK FORCE REPORT: CRIME AND ITS IMPACT—AN ASSESSMENT, pp. 25, 78, 208-210] indicates that minors will be stopped more frequently in proportion to their numbers than adults.

The U.F. 250 forms of the New York City Police Department include a space for the officer to state the suspect's age. This was filled in in most of the reports filed, but it may be concluded that in a large percentage of instances the information was merely an estimate. Comparison of this information with New York City arrest statistics show that about 52% of the arrests for crimes covered by the stop and frisk law were of persons under the age of 25, while this age group accounted for some 55% of the stops or frisks reported (A41). Persons under the age of 21 accounted for 36.6% of the arrests and 36.1% of the U.F. 250 reports. It also appears that the police rarely use the law against younger juveniles; persons under the age of 16 are stopped by force or frisked less frequently, in proportion to the total, than they are arrested, while persons 16 to 20 apparently are stopped by force or frisked relatively more often than they are arrested.

* This information was compiled by *amicus curiae*.

<i>Age reported</i>	<i>Persons</i>	<i>% of total reported</i>
Under 16	60	3.7
16 - 20	515	32.4
21 - 24	312	19.5
25 and older	715	44.2

For comparison, the following chart shows arrests and summonses by age groups for felonies and misdemeanors covered by N.Y. Code Crim. Proc. §180-a, compiled from the Annual Reports of the New York City Police Department, 1964-1966:

<i>Age</i>	<i>Persons</i>	<i>% of total</i>
Under 16	28,188	13.2
16 - 20	50,165	23.4
21 - 24	33,854	15.8
25 and older	101,962	47.2

Killings and Injuries of New York City Police Officers

The statistics reported below show unmistakably the physical dangers facing police officers in the performance of their duties. The bare numbers, however, reveal little specifically as to the reasonableness of a frisk or minimal search for weapons as a protective measure during field interrogation. For this, *amicus* turned to the original data underlying these statistics: the written reports of injuries to police officers, which are prepared whenever an officer is injured in the line of duty, and which are filed with the Personnel Safety Unit, Police Academy, New York City. Not having been prepared for purposes relevant to this brief, the reports are frequently too sketchy to show whether a "stop and frisk" situation was presented; for example, a report dated February 28, 1964, states that an officer was shot during an investigation of an armed robbery of a drug-store while he was "attempting to question" two suspects. Further, the reports do not cover assaults which did not cause injury. However, these reports, collectively, do show the unpredictable dangers to police in field work. Also, in many individual instances they are sufficiently detailed to illustrate the reasonableness of a self-protective frisk or search as an adjunct to on-the-street inquiry. Some illustrative cases are discussed above in the brief.

A

**New York City Police Killed While Apprehending or
Arresting Suspects***

	1960	1961	1962	1963	1964	1965	1966
Shot	1	2	4	4	3	1	1
Stabbed	1	0	0	0	0	0	1

B

**New York City Policemen Injured by Assaults While
Performing Duty (Excluding Deaths)****

	1960	1961	1962	1963	1964	1965	1966	1967 (6 mo.)†
Gunshot	—	9	13	7	10	12	3	15
Cut—stab	—	10	9	14	19	24	26	19
Struck by object	—	51	44	58	90	71	71	66
Bite, punch, kick, struck by vehicle, etc.	—	329	258	270	356	370	264	168
TOTAL	—	399	324	349	475	477	364	268

* Compiled from the Annual Reports of the New York City Police Department.

** Statistics compiled from the Annual Reports of the New York City Police Department. No comparable data prior to 1961.

† Information for 1967 supplied by Personnel Safety Unit, Police Academy.

IV

**Dangerous Weapons Received by Property Clerk of
New York City Police Department***


	<u>1960</u>	<u>1961</u>	<u>1962</u>	<u>1963</u>	<u>1964</u>	<u>1965</u>	<u>1966</u>
Revolvers, pistols	5017	4842	4979	5461	5104	5321	7762
Machine guns	2	1	3	7	10	3	11
Shotguns, rifles	589	569	664	893	971	1057	1063
Other (knives, air rifles, etc.)	3286	3284	4588	4853	5303	5316	5069
TOTAL	8,894	8,696	10,234	11,214	11,388	11,697	13,905

V

New York City Crimes

A

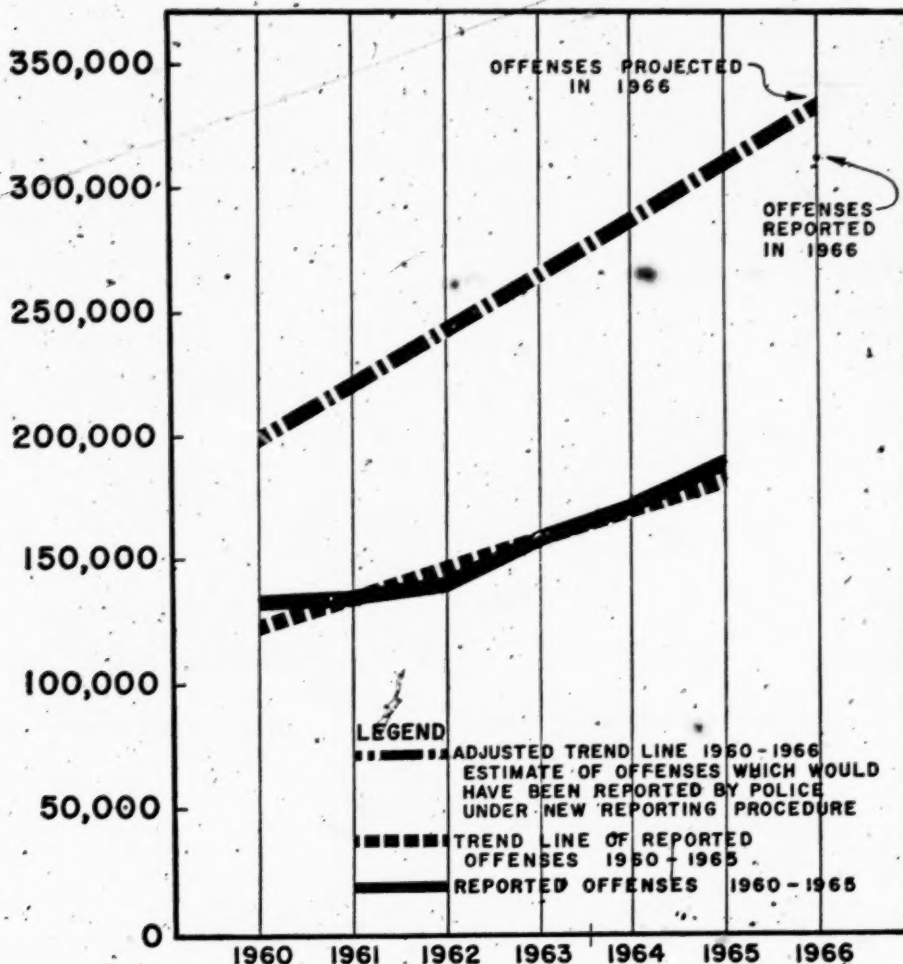
Crimes in New York City Reported to Police Department**

(See Opposite )

* Compiled from the Annual Reports of the New York City Police Department.

** Reproduction of 1966 Annual Report of the New York City Police Department, page 29.

OFFENSES KNOWN TO POLICE ACCORDING TO F.B.I. CRIME INDEX 1960 - 1966



**CHART 1 TOTAL CRIME INDEX OFFENSES KNOWN TO POLICE
UNDER PRESENT AND PREVIOUS CRIME REPORTING PROCEDURES**

**SOURCE: NEW YORK CITY POLICE DEPT., CRIME STATISTICS REPORTED
ANNUALLY TO F.B.I.**

During 1966, the Police Department instituted revised procedures for the reporting, recording and classification of crime. The purpose of this revision is to provide an accurate picture of the total amount of criminality in the city as reported to police. The new procedures brought the department's reporting techniques in line with those recommended by the Federal Bureau of Investigation for local police departments for inclusion in the Uniform Crime Reporting System. Processed by sophisticated, high speed data processing equipment the procedures proved of great value to the department in administrative tasks such as deployment of manpower and equipment.

No valid comparison can be made between crime reported in 1965 and 1966. Percentage increases indicated under the column "Statistical Increase" may not be considered to be actual increases since they represent a comparison between statistics furnished by two different reporting systems.

It was considered desirable, however, to attempt to estimate the "real" increase in crime for 1966. This estimate is based on the premise that if the new procedures had been instituted in 1960 a similar "statistical" increase would have occurred in that year and in succeeding years. Accordingly, a trend line was constructed, using the "Least Squares Function," which is a statistical method widely used by private industry and government agencies. The percentage increase in total major crimes from 1965 to 1966 was then applied to annual points on the trend line to construct an adjusted trend line that would have emerged had the new method of reporting been in effect for the period 1960-1965. The conclusion derived from the application of this statistical method was that there was an estimated 7.2 per cent "real increase" in total felony crime for 1966 and an estimated 6.5 per cent real increase in offenses reported in the Federal Bureau of Investigation Crime Index (See chart 1, above).

B

**Arrests and Summonses in New York City
for Felonies and Misdemeanors
Covered by N.Y. Code Crim. Proc. §180-a***

Total Arrests (Thousands)

<i>1960</i>	<i>1961</i>	<i>1962</i>	<i>1963</i>	<i>1964</i>	<i>1965</i>	<i>1966</i>
47.3	49.4	54.5	58.5	69.6	70.0	74.1

Arrests for Specific Crimes (Thousands)

	<i>1960</i>	<i>1961</i>	<i>1962</i>	<i>1963</i>	<i>1964</i>	<i>1965</i>	<i>1966</i>
Larceny**	8.2	8.3	8.9	10.1	11.6	11.4	12.1
Burglary†	7.8	8.2	8.8	10.0	11.0	10.5	11.0
Robbery	3.8	3.8	4.3	4.5	4.9	5.4	6.1
Weapons	2.3	2.4	2.7	2.4	2.6	2.7	2.3
Narcotics	7.8	6.7	7.9	8.6	13.5	13.9	15.3
Fel. Assault	9.0	9.5	9.7	10.3	12.0	12.5	13.1

* Compiled from the Annual Reports of the New York City Police Department.

** Includes grand larceny, larceny of motor vehicle, receiving stolen property (see A35).

† Includes unlawful entry, burglar's instruments (see A35).

VI

Use of Stop and Frisk by Buffalo Police Department**Statistical Summary of Stops Reported by Plainclothesmen**

In response to an inquiry by the District Attorney of New York County in connection with the preparation of this brief, the Honorable Frank N. Felicetta, Commissioner of Police of Buffalo, New York, the second largest city in the State, submitted statistics as to the application of Section 180-a of the New York Code of Criminal Procedure by the Buffalo Department of Police. We are informed that this information was compiled, in response to our request, at four Divisional Headquarters throughout the City of Buffalo, from the "P-73 daily activity reports" prepared daily by all members of the plainclothes units of the force, about 275 officers.

	<i>Total</i>	<i>1964</i>	<i>1965</i>	<i>1966</i>	<i>1967</i>
Persons stopped	1931	535	464	557	375
Persons frisked (pre-arrest)	553	140	150	151	112
Weapons recovered	80	20	23	28	9
Other contraband found	45	8	15	12	10
Persons arrested	490	147	147	129	91

DEC 15 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967

No. 63

NELSON SIBBON,

*Appellant,**against*

THE PEOPLE OF THE STATE OF NEW YORK.

APPELLANT'S SUPPLEMENTAL BRIEF

KALMAN FINKEL
GRETCHEN WHITE OBERMAN
The Legal Aid Society
Counsel for Appellant
100 Centre Street
New York, New York 10013

IN THE
Supreme Court of the United States

October Term, 1967

No. 63

NELSON SIBRON,

Appellant,

against

THE PEOPLE OF THE STATE OF NEW YORK:

APPELLANT'S SUPPLEMENTAL BRIEF

Pursuant to permission granted at the conclusion of oral argument of the appeal herein, this Supplemental Brief is filed directed to the question of mootness.

Our arguments are the same as those advanced in *Gallmon v. New York*, No. 758 Misc. Oct. Term, 1967, now before this Court on petition for writ of certiorari to the New York Court of Appeals.

A. *Jacobs v. New York* (388 U. S. 431) and *Tannenbaum v. New York* (388 U. S. 439) should be overruled;

- B. *Jacobs* and *Tannenbaum* are not applicable;
- C. If this case is moot, then the judgment appealed from should be vacated and the complaint dismissed.

A. *Jacobs* and *Tannenbaum* should be overruled.

Last Term this Court summarily dismissed as moot the *Jacobs* and *Tannenbaum* appeals upon the determination that the imposition of a suspended sentence insulated the case from review by this Court notwithstanding the fact that New York, as far as its appellate process was concerned, did not consider the cases moot.

Ninety per cent of the business of the criminal courts is conducted in inferior state courts of less than felony jurisdiction. Generally speaking these courts (juvenile courts, misdemeanor courts, etc.) are staffed by judges of lesser experience and competence than the felony courts, and counsel—both for the prosecution and the defense—are also the least experienced and competent. In these courts, courts with almost no public exposure, all of the vagrancy, loitering, disorderly conduct, and other petty offenses are heard; also most of the First Amendment claims are heard in connection with obscenity and free speech-disorderly conduct cases; and most of the Fourth Amendment claims are heard in connection with gambling and minor narcotics cases.

Thus, unless the relatively minor sentences imposed in these cases are held open by bail pending appeal all of

these cases will be insulated from federal review* Indeed if only six out of 327 appeals from the Criminal Court of the City of New York were indigent appellants at liberty on bail pending appeal.

Therefore practically all of these cases where a rough and summary justice is dispensed (see e.g., *Thompson v. City of Louisville*, 362 U. S. 199) and where serious constitutional problems most frequently appear will be forever insulated from federal review.

The only alternative to review by this Court, is to open the doors of the district court to immediate intervention on habeas corpus to all state prisoners serving short sentences who seek to raise a federal question which will be mooted by the lengthy procedure of going through the state courts and seeking review here.** This alternative procedure, a source of even greater federal-state friction than direct review by this Court, would open up thousands

* In 1966 the Legal Aid Society, representing 95% of the indigent appellants on convictions arising in New York City, was assigned to represent 327 appellants on appeals from judgments of conviction in the Criminal Court of the City of New York (misdemeanor jurisdiction only) and additionally to approximately 300 appeals from both felony and misdemeanor judgments rendered in proceedings commenced by felony indictment in the Supreme Court divisions located within the City of New York.

In 1964 there were 112,768 convictions and 12,356 acquittals on misdemeanors in the Criminal Court. 1964, *Report of the Criminal Court of the City of New York*. No accurate figure is immediately available for the number of "offenses" (disorderly conduct, prostitution, etc.) or the "Wayward Minor proceedings" held in the Criminal Court of the City of New York.

** We believe that the unavailability of bail pending appeal is sufficient to sustain immediate habeas corpus jurisdiction under the clause in 28 U.S.C. §2254 which relates to " * * * the existence of such circumstances rendering such [state] process ineffective to protect the rights of the prisoner."

of applications to the district courts without any preliminary screening by the state appellate courts.

Thus while the remoteness in time between conviction and decision by a state's highest appellate court will cause most prospective petitioners to drop out because of lack of endurance, sincerity, or interest, the district courts will be bombarded with writs the day after imposition of a misdemeanor sentence.

B. The *Jacobs* and *Tannenbaum* decisions are inapplicable.

In both *Jacobs* and *Tannenbaum*, under the standard there applied, the case was moot from a federal standpoint upon the imposition of the suspended sentence. In this case a prison sentence was imposed and served. Appellant's case was not federally "moot" from the beginning but if now moot became so because of the New York law which prohibited the Appellant's release upon bail pending appeal. New York Code of Criminal Procedure, §555(2)(c). Thus we are not here dealing with a case that was *Jacobs-Tannenbaum* moot *ab initio* but we are dealing with a case that the state forced into mootness by its own procedures.*

This distinction was recognized as critical by this Court in *St. Pierre v. United States*, 319 U. S. 41 (1943) where the Petitioner had failed to obtain bail from this Court pending the appeal of a federal contempt conviction. In

* The indigent appellant, unable to raise bail pending appeal, would seem to stand in the same position as the one for whom bail was prohibited by statute.

Appellant could not obtain bail because he was a multiple narcotic offender.

St. Pierre the Petitioner could have taken steps to prevent the expiration of sentence prior to certiorari.

Here the Appellant could not. He had been arrested on March 9, 1965 and remanded in lieu of \$1,000 bail. He was convicted on April 23 and was without counsel until May 14, 1965 when leave to appeal as a poor person was granted and appellate counsel assigned. Appellant was discharged upon expiration of sentence (less good time) on July 10, 1965. On June 11, 1965 the transcribed record, ordered by the *forma pauperis* grant of May 14, 1965, was filed and made available to assigned appellate counsel.* Appellant's brief was filed in the Appellate Term on August 26, 1965 for the September Session of that court and the conviction affirmed on October 13. Leave to appeal to the New York Court of Appeals was granted on November 9, 1965 and the case decided by the Court of Appeals on July 10, 1966.

Thus the Appellant was unable to preserve his case from expiration of sentence because,

1. He was not bailable;
2. Even if the Petitioner had been bailable it is incredible to presume that an indigent defendant who could not make the pre-trial bail of \$1,000 would be able, after a month in custody, to raise the increased amount which would be fixed after conviction.
3. There was no term of the intermediate appellate court in session while Appellant was in custody and while the record was available.

* The Appellate Term of the Supreme Court was in recess and heard no arguments on criminal appeals from June 7, 1965 to September 1965.

C. If this case is moot then the judgment appealed from should be vacated and the complaint dismissed.

Unlike *Parker v. Ellis*, 362 U. S. 574 (1960), this case comes here as part of the direct appellate process whereby the Appellant seeks vindication of his federal right. If the Appellant is to be precluded from review because of the State's invocation of a mootness doctrine then the Appellant is entitled to the benefit of the procedural protection of that same State's mootness doctrine; particularly so when the State concedes the conviction was wrongful. Under New York law a case, which has become moot while in the direct appellate process is to be reversed and the complaint or indictment dismissed. *People v. Mintz*, 20 N.Y. 2d 753 (1967).

Conclusion

For the foregoing reasons this case is not moot and this Court has jurisdiction over the appeal; alternatively the judgment should be vacated and the complaint dismissed.

Respectfully submitted,

KALMAN FINKEL
GRETCHEN WHITE OBERMAN
The Legal Aid Society
Counsel for Appellant



JAN 11 1968

JOHN F. DAVIS, CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM

No. 63

NELSON SIBRON,

Appellant,

—against—

THE STATE OF NEW YORK,

Respondents.

ON APPEAL FROM THE COURT OF APPEALS OF THE
STATE OF NEW YORK

RESPONDENTS' SUPPLEMENTAL BRIEF

AARON E. KOOTA
District Attorney
Kings County
Municipal Building,
Brooklyn, New York 11201

WILLIAM I. SIEGEL
Assistant District Attorney
Of Counsel.

IN THE
Supreme Court of the United States

October Term

No. 63

NELSON SIBRON,

Appellant,

—against—

THE STATE OF NEW YORK,

Respondents.

RESPONDENTS' SUPPLEMENTAL BRIEF

On oral argument the Court granted leave to appellant to file a supplemental brief directed to the question of mootness and similarly permitted the respondents to answer.

New York's paramount interest in the case lies in a construction by this Court of Section 180-a of the Code of Criminal Procedure and a determination by the Court that the statute and the practices permitted thereby do not violate either the letter or the spirit of the Fourth Amendment to the United States Constitution. For this reason we do not urge upon the Court that the appeal should be dismissed because of mootness. We content ourselves with setting forth for the information of the Court those facts concerning appellant which bear upon that question. These facts are shown in the Transcript of the Record.

Appellant was arrested on March 9, 1965 in the County of Kings (8).^{*} In a complaint filed against him in the

^{*} References are to the pages of the Transcript of the Record.

Criminal Court of the City of New York (1), he was charged with a violation of Penal Law, Section 1751 "in that he did feloniously and unlawfully possess a quantity of the narcotic drug, to wit: heroin as will appear from the following:" (The complaint thereafter detailed the circumstances of such possession).

Following a hearing on a motion to suppress in the same Court and following the denial thereof (6-21) on March 31, 1965, appellant on April 23, 1965 pleaded guilty to a violation of Public Health Law, Section 3305 in the possession of a quantity of heroin as a misdemeanor, and was sentenced as a multiple narcotics offender to the mandatory minimum sentence of six months in the Workhouse (23-26).

We subsequently received from the Department of Correction of the City of New York an information form concerning appellant which states:

City of New York
Department of Correction /
100 Centre Street
New York, N. Y. 10013
Records & Statistics Division

Date: 12/6/67

Time: 10:30 A.M.

This is to verify that the following information is on record:

Name: Nelson Sibron #2-65-2030

Address: 1678 St. Johns Place, Brooklyn, New York

Age: 27 Color: W

In Custody From: 3/10/65 To: 7/8/65

Original charge 1751. Sent. 3305, 6 mos. Penty.

Remarks: In custody continuously. Released by expiration of sentence.

Signature: Martha Parker:

Title: Sr. Clerk

(STAMP
DEPARTMENT
OF
CORRECTION)

While the Transcript of Record does not contain a statement of appellant's criminal record, he did concede during the hearing on the motion to suppress (8) that in 1956 he had been convicted of Burglary which in New York is a felony, and that he had been previously convicted in 1957 of a misdemeanor conviction for violation of Public Health Law, Section 3305 relating to the possession of narcotic drugs.

The question posed by this record, insofar as it relates to the problem of mootness, is whether appellant is so affected by the instant conviction that the doctrine of mootness should not apply (*Jacobs v. New York*, 388 US 431; *Tannenbaum v. New York*, 388 US 439).

We have referred to the fact that in the instant case appellant was sentenced as a multiple narcotics offender because of a prior narcotics conviction. Therefore the present conviction would not affect his fate should he subsequently be convicted of a narcotics offense because the provisions in the New York Revised Penal Law effec-

tive September 1, 1967 dealing with narcotics convictions, are similar to those of the former Penal Law. Thus, present Section 220.05 makes criminal possession of a dangerous drug a misdemeanor. Section 220.10 transmutes the same possession into a felony if the possession is accompanied by an intent to sell. Section 220.15 likewise creates the more serious felony of criminal possession when the possession with intent to sell is that of a narcotic drug. Section 220.20 increases the grade of the felony where the quantity possessed with intent to sell is larger. Sections 220.30 to 220.40 inclusive have the same gradations with respect to the crimes of sale of dangerous drugs and narcotic drugs. Drugs are classified in Section 220.00 as narcotic drugs, depressant or stimulant drugs and hallucinogenic drugs, all of which are termed dangerous drugs.

Should appellant in the future be convicted of a felony, the conviction presently under consideration in this case would likewise not affect his status as a multiple felony offender. Section 70.10 of the Revision, which authorizes the Court to impose more severe punishment upon a persistent felony offender, defines such persistent felony offender as one who has been previously convicted of two or more felonies. Under this statute, the instant conviction would of course not affect appellant's status under a subsequent felony conviction.

We recognize that upon the facts which we have above set forth and the law governing them it would appear that the instant appeal is moot. Nevertheless, we believe that because of the importance of the basic questions presented by the case, this Court in the exercise of its power can entertain the appeal and decide it.

It is therefore our hope that the Court will reach the merits of the case and consider and adjudicate the question of the constitutionality of Section 180-f of the Code of Criminal Procedure. If the Court does so, we of course rest upon our original brief.

DATED: Brooklyn, New York,
January 1967.

Respectfully submitted,

AARON E. KOOTA
District Attorney
Kings County

WILLIAM I. SIEGEL
Assistant District Attorney
of Counsel

LIBRARY
SUPREME COURT, U. S.
TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1966 7

No. ~~1192~~ 74

JOHN FRANCIS PETERS, APPELLANT

vs.

NEW YORK

APPEAL FROM THE COURT OF APPEALS OF NEW YORK

FILED OCTOBER 10, 1966
PROBABLE JURISDICTION NOTED MARCH 27, 1967

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1192

JOHN FRANCIS PETERS, APPELLANT

vs.

NEW YORK

APPEAL FROM THE COURT OF APPEALS OF NEW YORK

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[fol. 1]

IN THE COUNTY COURT, WESTCHESTER COUNTY

PEOPLE OF THE STATE OF NEW YORK

-against-

JOHN FRANCIS PETERS, DEFENDANT

INDICTMENT—Filed August 25, 1964

THE GRAND JURY OF THE COUNTY OF WESTCHESTER, by this indictment, accuse the defendant of the crime of FELONIOUS POSSESSION OF BURGLAR'S INSTRUMENTS, committed as follows:

The said defendant, in the City of Mount Vernon, County of Westchester and State of New York, on or about the 10th day of July, 1964, had in his possession picks, wrenches, and other tools, the same being adapted, designed and commonly used for the commission of the crimes of burglary and larceny, under circumstances evincing an intent to use and employ the same in the commission of a crime, and knowing that the same were intended to be so used.

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the People of the State of New York.

/s/ Leonard Rubinfeld
District Attorney of West-
chester County

[fol. 2]

568-64
28-688

**WESTCHESTER COUNTY
COUNTY COURT**

[File Endorsement Omitted]

PEOPLE OF THE STATE OF NEW YORK

~~against~~

JOHN FRANCIS PETERS, DEFENDANT

FELONIOUS POSSESSION OF BURGLAR'S INSTRUMENTS

/s/ Leonard Rubinfeld
District Attorney

A TRUE BILL

Received Aug. 26, 1964, Edward L. Warren,
County Clerk

/s/ A. Raymond Miller
Foreman of Grand Jury.

[fol. 3]

IN THE COUNTY COURT,
WESTCHESTER COUNTY

[Title Omitted]

7909/64

71/26

NOTICE OF MOTION TO SUPPRESS, ETC.—
September 15, 1964

SIR:

PLEASE TAKE NOTICE, that upon the annexed affidavits of ROBERT S. FRIEDMAN, Esq., and JOHN FRANCIS PETERS, both sworn to the 11th day of September, 1964, and upon the transcript of the preliminary hearing had before the HON. HARRY ZIMMERMAN, Acting City Judge, Court of Special Sessions, City of Mount Vernon, and upon all the papers and proceedings heretofore had herein, the undersigned will move this Court at a Special Term, Part I thereof, to be held in and for the County of Westchester, at the Courthouse thereof, Main Street, City of White Plains, County of Westchester, State of New York, on the 29th day of September, 1964, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for

- (1) an Order directing the suppression of certain evidence seized from the defendant's person,
- (2) for an Order permitting the defendant to inspect the Grand Jury minutes herein, or in the alternative, if the Court should read said minutes, for an order directing the dismissal of the within indictment upon the grounds that the within indictment is not founded upon sufficient legal evidence,

[fol. 4] together with such other, further, and different relief as to this Court may seem just and proper in the premises.

Answering affidavits must be served five (5) days before the return date.

DATED: White Plains, New York
September 15, 1964

Yours, etc.,

FRIEDMAN, FRIEDMAN AND
FRIEDMAN
Attorneys for Defendant
Office and Post Office Address
172 South Broadway, suite 209
White Plains, New York
Phone: White Plains 9-4114

TO: HON. LEONARD RUBENFELD,
District Attorney, Westchester County
Office and Post Office Address
Westchester County Courthouse
166 Main Street
White Plains, New York

[fol. 5]

AFFIDAVIT OF JOHN FRANCIS PETERS IN SUPPORT OF
MOTION TO SUPPRESS

STATE OF NEW YORK)
) SS.:
COUNTY OF WESTCHESTER)

JOHN FRANCIS PETERS, being duly sworn, deposes and says:

FIRST: That at all times hereinafter mentioned your deponent resided at # 30-46 23rd Street, Astoria, County of Queens, State of New York.

SECOND: That heretofore and on or about the 10th day of July, 1964, at or about 1:00 p.m. on that day, your

deponent was visiting the premises known and designated as # 465 East Lincoln Avenue in the City of Mount Vernon, County of Westchester, State of New York. That at that time and place your deponent had gone to the aforementioned premises to visit a friend.

At that time and place your deponent was descending the stairway which connects the fourth (4th) and fifth (5th) floors of said premises when he was accosted by a man who your deponent later learned to be one SAMUEL LASKY, a police officer attached to the Police Department of the City of New York. OFFICER LASKY approached your deponent while pointing a revolver in your deponent's direction. OFFICER LASKY then grabbed your deponent by the shirt collar and, while pointing his [fol. 6] revolver directly at your deponent, he asked your deponent, "What are you doing here?"

Your deponent informed the police officer that he was in said premises for the purpose of visiting his girl friend. OFFICER LASKY then asked your deponent for the name of your deponent's girl friend. Your deponent told OFFICER LASKY, in substance, that your deponent's girl friend was a married woman and, therefore, your deponent could not divulge her name. Whereupon, OFFICER LASKY started to search your deponent. The police officer removed various items of personalty from your deponent's possession.

At no time during these events did OFFICER LASKY identify himself as a police officer. OFFICER LASKY never exhibited a police badge or any other indicia of lawful authority, nor did he ever place your deponent under arrest, or exhibit to your deponent a search warrant authorizing the search of your deponent's person.

Shortly after OFFICER LASKY searched your deponent, police officers attached to the Police Department of the City of Mount Vernon, County of Westchester, State of New York, arrived upon the scene and arrested your deponent for allegedly having violated Section 408 of the Penal Law of the State of New York, to wit, the illegal possession of burglar's tools. Your deponent was subsequently taken to Mount Vernon Police Headquarters where he was fingerprinted, booked, and held for an ap-

pearance before the Court of Special Sessions of the City of Mount Vernon. Thereafter and on the 13th day of July, 1964, your deponent appeared before the Court of Special Sessions of the City of Mount Vernon, where he was arraigned on a charge of having violated Section 408 of the Penal Law.

Subsequently, and on or about the 28th day of July, 1964, your deponent again appeared before the Court of [fol. 7] Special Sessions of the City of Mount Vernon. At that time and place a preliminary hearing was held with respect to the charges made against your deponent and the matter was held for the further action of the Grand Jury of Westchester County.

Said Grand Jury thereafter returned the indictment against your deponent which is presently before this Court.

On the 2nd day of September, 1964, your deponent appeared before this Court for the purpose of pleading to the within indictment and at that time, while reserving his right to demur or otherwise move with respect to said indictment, your deponent pleaded not guilty to the charges made against him.

/s/ John Francis Peters
JOHN FRANCIS PETERS

Sworn to before me this
11th day of September,
1964.

/s/ Robert S. Friedman
Notary Public

ROBERT S. FRIEDMAN
Notary Public, State of New York
No. 60-6416200
Qualified in Westchester County
Commission expires March 30, 1966

[fol. 8]

AFFIDAVIT OF ROBERT S. FRIEDMAN IN SUPPORT OF
MOTION TO SUPPRESS

STATE OF NEW YORK)
) SS.:
COUNTY OF WESTCHESTER)

ROBERT S. FRIEDMAN, being duly sworn, deposes and says:

FIRST: That your deponent is a member of the firm of FRIEDMAN, FRIEDMAN AND FRIEDMAN, Esqs., attorneys at law, and that said firm maintains offices for the practice of law at # 172 South Broadway in the City of White Plains, County of Westchester, State of New York.

SECOND: That your deponent is fully familiar with all the material facts herein.

THIRD: That heretofore and on or about the 10th day of July, 1964, the defendant, JOHN FRANCIS PETERS, was arrested by police officers attached to the Police Department of the City of Mount Vernon, County of Westchester, State of New York. The defendant was charged by said police officers with having violated Section 408 of the Penal Law of the State of New York. The gravamen of said charge being the illegal possession of burglar's tools.

Subsequently and on or about the 28th day of July, 1964, the defendant appeared before the Court of Special Sessions of the City of Mount Vernon, where a preliminary hearing was held with respect to the charges made against the defendant. At the conclusion of said hearing [fol. 9] the defendant was held for the further action of the Grand Jury of Westchester County. Thereafter the Grand Jury of Westchester County returned an indictment against the defendant, which indictment is presently before this Court.

Annexed hereto and made a part of the moving papers herein is a photostatic copy of the transcript of the preliminary hearing had before the HON. HARRY ZIM-

MERMAN, Acting City Judge of the Court of Special Sessions of the City of Mount Vernon.

Upon the preliminary hearing, the People presented two (2) witnesses in support of their case. The People's first witness was one SAMUEL L. LASKY, a police officer attached to the Police Department of the City of New York.

OFFICER LASKY testified, in substance, that he resided in a sixth (6th) floor apartment at # 465 East Lincoln Avenue, Mount Vernon, New York. His testimony revealed those premises to be a multiple dwelling, housing approximately one hundred twenty (120) families. (S.M. p. 3)

It was the testimony of OFFICER LASKY that on the 10th day of July, 1964, at or about 1:00 p.m. on that day, that he observed through the "peep hole" of his apartment door two (2) men tiptoeing towards the sixth (6th) floor stairway in his building. (S.M. p. 4) He further testified that he left his apartment, taking with him his revolver, and ran after the defendant, and that he apprehended the defendant between the fourth (4th) and fifth (5th) floors of the aforementioned premises, while the defendant was descending the stairway. (S.M. pp. 4 and 5)

While OFFICER LASKY pointed a revolver at the defendant, and while he had the defendant by the shirt collar, he asked the defendant why he was in the premises. The defendant told the police officer, in substance, [fol. 10] that he was in the premises in order to visit a girl friend. Upon being asked by the police officer for the name of the girl friend, the defendant refused to divulge the same, stating that the woman in question was a married woman. (see S.M. pp. 6, 7, and 13)

OFFICER LASKY testified on direct examination that he searched the defendant's person and removed therefrom an opaque plastic envelope, which he opened and which allegedly contained certain tools adaptable to the commission of burglaries. (S.M. pp. 7 and 8)

Cross-examination revealed that at the time of the occurrence the police officer was not in uniform, that he did not have his police badge, that he approached the defend-

ant with a drawn gun, that he failed to identify himself as a police officer and that, prior to the time he opened the envelope taken from the defendant's possession, he *had not* placed the defendant under arrest. (see S.M. pp. 11-15) OFFICER LASKY'S testimony further revealed that, after searching the defendant, he took the defendant to the first floor of the premises, and from the manager's office of said premises a telephone call was made to the Mount Vernon Police Department.

The second witness called by the People was one HYMAN GOODMAN, who testified that he was the Managing Agent of the subject premises and that the defendant, JOHN PETERS, was not a tenant of said premises. (S.M. p. 16)

At the conclusion of the People's case, the matter was held for he further action of the Grand Jury.

FOURTH: That your deponent makes this affidavit in support of the instant motion seeking the relief requested in the Notice of Motion herein. That your deponent desires to set forth the grounds which your deponent believes support and require the granting of the requested relief.

[fol. 11] Counsel respectfully submits to this learned Court that the evidence seized from the defendant's person, i.e., the envelope allegedly containing burglar's tools, should be suppressed as being the fruits of an illegal search and seizure.

The Fourth Amendment to the United States Constitution and Article I, Section 12 of the Constitution of the State of New York provide for the rights of the people to be secure against unreasonable searches and seizures. These constitutional provisions have been implemented by Sections 791-813 of the Code of Criminal Procedure. It is respectfully submitted to this learned Court that the law governing the reasonableness of a search and seizure requires that one or more of three conditions *must* be met in order for a search and/or seizure to be reasonable.

- (a) A search is reasonable when it is conducted pursuant to a lawfully issued search warrant.

or

(b) A search is reasonable when it is conducted pursuant to consent,

or

(c) A search is reasonable when it is conducted as an incident to a lawful arrest.

People v. Loria, 10 N.Y. 2d 368, 223 N.Y.S. 2d 462 (Court of Appeals, 1961).

Counsel respectfully submits that in the instant case it is patently obvious that none of the aforementioned conditions have been met. It is equally obvious that the actions taken by OFFICER LASKY and the defendant's subsequent arrest were without authority in law, and were in clear violation of the defendant's rights under the Constitutions of the United States of America and the State of New York and the implementing statutes hereinabove referred to.

[fol. 12] The transcript of the preliminary hearing clearly indicates that the defendant was not searched pursuant to a lawful warrant, and that the defendant did in no way give his consent to the search in question. Equally clear from said transcript is the fact that the defendant was searched prior to being arrested, and that his subsequent arrest resulted from the search. (see S.M. p. 15).

It is axiomatic that a search and seizure which is illegal at its inception cannot later become legalized by the results of that search and seizure, and that the legality of such a search and seizure must be determined by the facts as disclosed before the search was made. It is respectfully submitted that a search and seizure must be justified by the steps which precede it, which must be lawful in their entirety. Further, it has long been held that the fruits of an illegal search cannot be used against a defendant.

McDonald v. United States, 335 U.S. 451, 69 S. Ct. 191, 93 L.Ed. 153 (1948);

Johnson v. United States, 333 U.S. 10, 68 S. Ct. 367, 92 L.Ed. 436 (1948);

Nueslein v. District of Columbia, 73 App. D.C. 85, 115 F 2d 690 (1940).

The defendant was illegally searched, and evidence was illegally seized from his person, as a result of OFFICER LASKY'S illegal and unwarranted action. The transcript of the preliminary hearing makes it abundantly clear that OFFICER LASKY had no reason to believe that a crime had been committed, or was in the process of being committed, or that the defendant, in any manner, shape or form, had committed or was committing any illegal or wrongful act.

As was stated by the court in *Henry v. U.S.*, 361 U.S., 98, 104, 80 S. Ct. 168, 172, 4 L.Ed. 2d 134:

[fol. 13] “. . . an arrest is not justified by what the subsequent search discloses. *Under our system suspicion is not enough for an officer to lay hands on a citizen . . .*” (Emphasis supplied)

Counsel respectfully submits to this learned Court that the evidence in this case, seized from the person of the defendant, must be suppressed as the fruits of an illegal search and seizure.

With respect to that branch of the instant motion directed towards the sufficiency of the evidence presented to the Grand Jury, counsel respectfully submits that the only evidence which could have been submitted to the Grand Jury must have been evidence substantially similar in content to the testimony given on the preliminary examination held before JUDGE ZIMMERMAN. It is respectfully submitted, when the illegal evidence seized from the person of the defendant is subtracted from the totality of the evidence presented, there remains insufficient evidence to support the finding of the indictment herein.

In view of the foregoing, your deponent respectfully prays that an order be made and entered herein suppressing the evidence seized from the defendant's person, and permitting the defendant to inspect the Grand Jury minutes herein, or, in the alternative, if the Court should read said minutes, dismissing the within indictment upon the grounds that the within indictment is not founded upon sufficient legal evidence, together with such other, further

and different relief as to this Court may seem just and proper.

/s/ Robert S. Friedman
ROBERT S. FRIEDMAN

Sworn to before me this
11th day of September, 1964.

/s/ Martin S. Friedman
Notary Public

MARTIN S. FRIEDMAN
Notary Public, State of New York
No. 44-1326965
Qualified in Rockland County
Commission Expires March 30, 1965

[fol. 14]

Received, District Attorney, Sep. 15, 3:49 P.M., '64,
Westchester County

[fol. 15]

IN THE COURT OF SPECIAL SESSIONS
CITY OF MOUNT VERNON

THE PEOPLE OF THE STATE OF NEW YORK on the Infor-
mation of Police Officer, THOMAS DROHAN, COMPLAINANT

-against-

JOHN PETERS, DEFENDANT

MINUTES OF HEARING—July 28, 1964

BEFORE:

HON. HARRY ZIMMERMAN
Acting City Judge

APPEARANCES:

ANTHONY J. CAPUTO, ESQ.
Assistant Corporation Counsel
City of Mount Vernon
For the Prosecution

RICHARD D. FRIEDMAN, ESQ.
Attorney for the Defendant
172 South Broadway
White Plains, N.Y.

[fol. 16] July 13, 1964—Defendant arraigned on the
following Information:

STATE OF NEW YORK)
COUNTY OF WESTCHESTER) SS.
CITY OF MOUNT VERNON)

THOMAS DROHAN, a Police Officer in and for the
City of Mount Vernon, comes and for Information, being
duly sworn, on oath says: That at the City of Mount
Vernon, in the said County, on the 10th day of July, 1964,
one JOHN PETERS did wilfully and unlawfully have in
his possession burglar's tools, to wit: picks, allen wrench-

es, adapted screwdriver, a pair of white woman's gloves, implements adapted or commonly used for the commission of burglary or larceny under circumstances evincing an intent to use and employ the same.

/s/ THOMAS DROHAN

Subscribed and sworn to before me
this 13th day of July, 1964.

/s/ SAMUEL J. RESNICK
Clerk of City Court, Mount Vernon, N.Y.

[fol. 17] MR. FRIEDMAN: With your Honor's permission, I respectfully request that the police witnesses be excluded from the Court.

THE COURT: Mr. Caputo, have you any objection to that?

MR. CAPUTO: It is not a trial and I don't know whether the same rights prevail.

THE COURT: All witnesses are excused. Please wait outside.

[fol. 18] On July 28, 1964 Hearing proceeds as follows:

SAMUEL L. LASKY, 465 E. Lincoln Avenue, Mount Vernon, N.Y. called as a Witness on behalf of the Prosecution having been duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. CAPUTO:

Q Mr. Lasky, where do you reside?

A 465 E. Lincoln Avenue, Mount Vernon, N. Y.

Q On what floor do you live?

A On the top floor, apartment 603.

Q Will you describe the building to us, please?

A It is a 6-story brick building with 2 wings to it. There are 10 tenants on each floor and 6 floors on each wing. I live on the top floor.

Q At about one o'clock on that day, were you home in your apartment?

MR. FRIEDMAN: Was that one o'clock in the afternoon?

MR. CAPUTO: Yes, it was 1:00 P.M.

A Yes, I was home.

Q Did you have occasion to observe the defendant in this matter at or about that time?

A I did.

[fol. 19] Q Did you have occasion to observe the defendant in this matter at or about that time?

A I did.

Q Will you tell us what happened on that afternoon in the apartment house?

A I just stepped out of the shower and was in the process of drying myself when I heard a noise at the door. After I heard the noise at the door, my telephone rang and I went to answer it in the bedroom. After speaking to the person at the other end of the phone, I went to the door and looked out the peep hole and there I saw two men tiptoeing out of the alcove toward the stairway. I went to the telephone and called police headquarters and told the Sergeant at the desk that two burglars were on my floor.

MR. FRIEDMAN: I object.

THE COURT: Sustained.

MR. FRIEDMAN: I move to strike that out.

MR. CAPUTO: Please continue.

A I told the man who answered the phone that there was someone—

MR. FRIEDMAN: I object to any conversation.

THE COURT: Sustained.

MR. CAPUTO: Just tell us what happened.

[fol. 20] A I put some clothes on and went back to the door and saw a tall man tiptoeing away from the alcove and followed by this shorter man, Mr. Peters, toward the stairway.

Q Do you recognize the man as the defendant in this case?

A Yes, I do.

Q Please continue.

A I slammed the door, I had my gun and I ran down the stairs after them. I apprehended Mr. Peters between the fourth and fifth floors going down the stairway.

Q Before he started to run?

MR. FRIEDMAN: I object to that. The witness said he ran.

THE COURT: Overruled.

MR. FRIEDMAN: Exception.

Q At any time before you apprehended the defendant, did you have any conversation with him?

A No.

Q Did you say anything?

A No. When I went out my door, I ran down the hallway and went down the same stairway that I saw Mr. Peters and the fellow with him going down. I heard footsteps running down the stairway and between the 4th and 5th floors I collared him.

THE COURT: What is your business?

[fol. 21] MR. LASKY: I am a police officer.

THE COURT: Is the gun the one you use in the course of your duties as police officer?

MR. LASKY: Yes, and I carry it off duty. It is a registered revolver.

Q When you apprehended the defendant, did you have a conversation?

A I asked him what he was doing in the building. He said he was looking for a girl friend.

Q Where was the other person?

A The other person was still ahead down after I apprehended Mr. Peters. He was still going downstairs.

Q Did you make any attempt to apprehend him?

A Yes, I had Mr. Peters by the shirt collar and I began to run with Mr. Peters down the stairs.

Q Was Mr. Peters saying anything at this time?

A No.

Q How long have you lived in this apartment house?

A 12 years.

Q To your recollection, is Mr. Peters a tenant in the building?

A No.

Q What happened after that, after you brought him down stairs?

[fol. 22] A I brought him down to the 4th floor to see if a window was open to see if anybody was downstairs

that I could alert, and I frisked Mr. Peters and out of his right pants pocket I took a plastic envelope containing—

MR. FRIEDMAN: I object as to the contents of this.

THE COURT: Mr. Friedman, you are premature. He said he took a plastic envelope out of his pocket.

Q What did you take from his pocket?

A A plastic envelope.

Q What, if anything, was in the envelope?

MR. FRIEDMAN: I object.

THE COURT: Was this sealed when you took it from him?

A No.

Q Did you examine this?

A I didn't examine it thoroughly.

THE COURT: Do you know what was in there? Tell us what was in there.

MR. FRIEDMAN: I object. I am going to ask for a preliminary examination.

THE COURT: What were the contents when you first examined the envelope?

[fol. 23] A 6 Picks and 2 Allen wrenches with the short leg filed down to a screw driver edge, and a tension bar.

THE COURT: How long have you been on the New York City police force?

A Almost 18 years.

THE COURT: In the course of your 18 years on the police force, did you have cause to investigate burglaries?

A Yes sir, I did.

THE COURT: About how many? Can you estimate?

A Hundreds.

THE COURT: Based on your experience and investigation of burglaries, in your opinion were these items adaptable to committing burglaries?

A Yes.

Q I show you this envelope and ask you if this is the envelope and were these the items you took from the defendant at that time?

A Yes sir.

Q Were these the items that were in the envelope?

A Yes.

Q What did you do with this envelope?

A I put it in my pocket and later gave it to the [fol.24] detective who arrived at the scene, Detective Hodgins.

MR. CAPUTO: I offer it in evidence.

(Plastic envelope accepted and marked People's Exhibit "I" in Evidence).

MR. FRIEDMAN: May I have voir dire concerning admissability?

VOIR DIRE EXAMINATION BY MR. FRIEDMAN:

Q MR. Lasky, at the time you say you looked out of the peep hole of your apartment, were you able to see the faces of the men?

MR. CAPUTO: Objection.

THE COURT: Sustained.

Q Had you, when you took the defendant into custody, either apprehended him or placed him under arrest and charged him with the commission of any crime?

MR. CAPUTO: Objection.

THE COURT: Sustained.

MR. FRIEDMAN: Exception.

Q Did you have any warrant which authorized you to search the person of this man when you apprehended him?

MR. CAPUTO: I object.

THE COURT: Object sustained.

Q Had you seen this defendant do anything for which you placed him under arrest?

[fol.25] MR. CAPUTO: Objection.

THE COURT: Sustained.

MR. FRIEDMAN: Exception.

Q Did you ask permission of the defendant before you searched him?

A No, I didn't.

Q The envelope in which these particular items were found is an opaque piece of plastic which you cannot see through. Is that correct?

A Yes.

Q When you removed this envelope from the defendant's pocket you were not able to see what the contents were, is that right?

A That's right.

MR. CAPUTO: I object.

THE COURT: Sustained.

MR. FRIEDMAN: Exception.

MR. CAPUTO RESUMES EXAMINING THE DEFENDANT:

Q I believe you went to the ground floor with the defendant.

A I was on the 4th floor. I went back to the 6th floor to see what had occurred in the doorway that he had come out of.

Q Did you examine that door?

A Not too close. I saw a note in the doorway and [fol. 26] in my estimation they didn't get in.

Q You didn't read the note?

A I came back later for it. I took him down to the 6th floor, I mean to the 1st floor from the 6th floor by elevator and I informed the Management's Office to alert the Police Department by telephone for the other fellow who got away.

Q Did there come a time when the Mount Vernon Police arrived?

A Yes.

Q What took place at that time?

A I informed them what took place and turned the envelope over to the detective.

Q Had you ever seen the defendant before this day?

A No.

MR. CAPUTO: No further questions.

CROSS EXAMINATION BY MR. FRIEDMAN:

Q Mr. Lasky, when you looked out of the peep hole for the first time and you saw 2 men, were you able to see the faces of the men in the hallway?

A Yes, I gave a description to the man at the switchboard.

Q How long a period of time did you watch out of peep hole before you went back to the recesses of the apartment to answer the telephone?

[fol. 27] A I didn't answer the telephone. I made a telephone call.

Q How long?

A Only a matter of walking 50 or 60 feet and picking up the telephone.

Q Were you on the telephone for a few minutes, a few seconds, or how long?

A Just a few minutes.

Q When you came back to the peep hole, were you still able to see the 2 men?

A I saw them again tiptoeing out of the alcove, just like a reenactment of the first time.

Q Did they then go downstairs?

A I couldn't see.

Q Did you open the door of your apartment?

A Yes.

Q Did you run down the hallway?

A Yes.

Q Did you see anything?

A No.

Q Did you have your uniform on?

A No.

Q Did you have your police badge?

A No.

Q Did you have your gun out?

A I did.

[fol. 28] Q Was he walking down the stairway?

A He was walking in a rapid way.

Q Was the other man there that you had seen briefly with the defendant PETERS at that time?

A I didn't see the other man down the stairway.

Q You only saw the one person PETERS. Now, Officer Lasky are you able to state with certainty that one of the men on the 6th floor, when you looked out, was the person PETERS that you later saw on the 4 floor?

A Yes.

Q When you went up to Mr. Peters you say you "col-lared" him. What did you do physically?

A I grabbed him by the shirt collar.

Q Did you have your gun drawn at this time?

A My gun was in my hand.

Q Did you place Mr. Peters under arrest?

MR. CAPUTO: I object.

THE COURT: Sustained.

Q When you took him by the collar what did you say to him, if anything?

A I asked him what he was doing in the building.

Q And what did he say?

A He said he was looking for a girl.

Q You asked him for the name and he made no response?

A He made no response.

[fol. 29] Q Did the defendant tell you she was a married woman and didn't want to give the name?

A Yes.

Q Thereafter you searched Mr. Peters?

A I frisked him. I tapped his groin pockets and under his arms, and in frisking him I was looking for a weapon.

Q Did your frisking reveal a weapon?

A I felt something hard.

Q Did it have the shape of a gun?

MR. CAPUTO: I object.

THE COURT: Overruled.

THE COURT: You felt something hard in his pocket. Did it seem like a gun?

A No.

MR. FRIEDMAN RESUMES EXAMINATION:

Q Did it seem to be the envelope that was recovered?

A I didn't know what it contained.

Q Did it seem like some other weapon?

A It could have been.

Q Did it feel like a knife?

A It may have.

Q Did it feel like a knife?

A It could have been a knife.

Q Were you able to feel the length of this object before you took it out of the defendant's pocket?

[fol. 30] MR. CAPUTO: I object.

THE COURT: Overruled. Now, proceed Counsel.

Q Were you able to feel the length of this object, this hard object which you say was in the defendant's pocket?

A No.

Q Were you able to feel as to its width?

A No.

Q Did you remove this object from his pocket?

A I did.

Q Was it the first thing you removed from the defendant's person?

A Yes.

Q At that point, just prior to the time you removed the envelope from the defendant's pocket, did you say to him in so many words, you are under arrest?

A I don't recall.

Q Prior to the time you opened the envelope did you say to Mr. Peters that he was under arrest?

A No, I didn't.

Q Did you put this plastic envelope into your pocket?

A I did.

MR. FRIEDMAN: That's all I have of this Witness.

[fol. 31] HYMAN GOODMAN, 465 E. Lincoln Avenue, Mount Vernon, N.Y., called as a Witness on behalf of the prosecution, having been duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. CAPUTO:

Q What is your occupation?

A I am the Managing Agent.

Q Are you the Managing Agent of 465 E. Lincoln Avenue, Mount Vernon?

A Yes.

Q Were you the Managing Agent on the 10th day of July, 1964?

A I was.

Q How long have you been the Managing Agent?

A Since March, 1960.

Q Are you familiar with the tenants in the building?

A Yes, I am.

Q I show you the defendant, JOHN PETERS, and

ask you if he is a tenant at 465 E. Lincoln Avenue, Mount Vernon?

A He is not.

Q Have you ever seen him before?

A No sir.

MR. CAPUTO: No further questions.

MR. FRIEDMAN: I have no questions your Honor, excuse me, may I?

[fol. 32] CROSS EXAMINATION BY MR. FRIEDMAN:

Q Mr. Witness, were you in your Managing Office when this defendant Mr. Peters was brought there?

A I was.

MR. CAPUTO: I object because it is out of the scope of my direct examination.

THE COURT: Sustained.

MR. FRIEDMAN: I except.

Q Were you present at the time the Mount Vernon City police officer came to your office?

A I was there prior to that time.

Q Were you present when the preceding Witness, Officer Lasky of the New York City Police Department, had Mr. Peters in your office?

A I was.

Q During what period of time?

THE COURT: There is no evidence that Mr. Lasky had the defendant in Mr. Goodman's office.

Q Was he there?

A He was.

Q Did you stay in the office until such time as the Mount Vernon City police arrived on the scene?

A I was there.

[fol. 33] Q Did the Mount Vernon City Police come into your office at the time the defendant PETERS was there?

A I could give you the story exactly as it happened in my own words.

THE COURT: Who was there first? Was the defendant PETERS there before the police came?

A No.

Q Did the police and the defendant come into your office?

A Yes.

Q When the police came into the office with Mr. Peters, were there one or more?

A I called the police on the phone and in a few seconds they came from all sides simultaneously and brought the defendant into my place.

Q Mr. Goodman, did you stay in your office while the police were there with the defendant?

A Just for a few seconds.

Q Do you know who Patrolman Lasky is?

A I do.

THE COURT: Please refer to Patrolman Lasky as *Mr. Lasky*.

Q Did you hear Mr. Lasky say to any Mount Vernon policemen when you were in the room, that he searched [fol. 34] the defendant and found him to be clean.

MR. CAPUTO: Objection.

THE COURT: Sustained.

MR. FRIEDMAN: Exception.

Q Did you stay in this particular office at any time—
(I withdraw the question). I have no further questions.

THE COURT: You are excused.

MR. FRIEDMAN: At this time the defendant moves to dismiss on the grounds that the People have failed to prove a prima facie case and have failed to show these implements were recovered through the process of a lawful arrest under the Constitution.

THE COURT: Motion denied.

MR. FRIEDMAN: Respectfully accepted. The defendant respectfully waives further examination in this Court.

THE COURT: The Court holds the defendant for the action of the Westchester County Grand Jury.

THE COURT ADDRESSES MR. PETERS:

Q Mr. Peters, where do you live?

A 3042 23rd Street, Long Island City, New York.

Q Are you married?

A Yes.

[fol. 35] MR. FRIEDMAN: The defendant was previously admitted to bail by a justice of the County Court in the amount of \$5000.00. I ask bail be continued. The bail was recommended by the office of the District Attorney. The defendant's bail is posted by the Peerless Insurance Casualty Company.

THE COURT: Bail continued.

CERTIFIED to be a true and correct transcript of the Minutes of Hearing held on July 28, 1964, in the COURT OF SPECIAL SESSIONS, CITY OF MOUNT VERNON, in the Matter of THE PEOPLE OF THE STATE OF NEW YORK, on the Information of Patrolman Thomas Drohan, Complainant, against JOHN PETERS, Defendant.

/s/ Rita R. Reynolds
Secretary

[fol. 36]

IN THE COUNTY COURT
WESTCHESTER COUNTY

[Title Omitted]

7909/64

STATE OF NEW YORK)
) SS.:
COUNTY OF WESTCHESTER)

AFFIDAVIT OF JAMES J. DUGGAN IN OPPOSITION—
October 7, 1964

JAMES J. DUGGAN, being duly sworn, deposes and says that he is an Assistant District Attorney of the County of Westchester and makes this affidavit in opposition to a motion made on behalf of the defendant for a suppression of certain evidence seized from him and further for an order permitting an inspection by him or on his behalf of the Grand Jury minutes herein.

It is not your deponent's intention lightly to dismiss the obviously well prepared and exhaustively documented memorandum of law heretofore submitted on the defendant's behalf, but it is instantly apparent that it was written with total disregard for the criteria laid down by the Court of Appeals in *People v. Rivera*, 14 N. Y. 2d 441, for the authority of an officer to frisk a suspicious person. On September 2, 1964, the defendant was indicted by the Grand Jury of this county for the felonious possession of burglars' tools in violation of the Penal Law, sec. 408, and thereafter he pleaded not guilty to that crime in this Court.

Shortly following the defendant's arrest he appeared at a preliminary examination of this charge held in the City of Mount Vernon before Honorable Harry Zimmerman, Acting City Judge. The minutes of that examination are attached to the defendant's moving affidavit, and for the purposes of this argument we accept them as accurate. Briefly stated, a tenant at 465 East Lincoln Avenue, Mount Vernon, Samuel L. Lasky, who also is a

patrolman of the Police Department of the City of New York, observed the defendant and a companion tiptoeing about the sixth floor landing of this apartment building. He noted this conduct after hearing a sound at his own [fol. 37] door (SM 4). He called the Mount Vernon police and returned to the door after donning some clothes. The defendant was still tiptoeing around the hallway, so the officer opened the door, gun in hand, and apprehended the defendant who was then fleeing down the steps of the building (SM 5). The defendant was unable to offer the officer any satisfactory answer as to what he was doing in the building, and Lasky knew that the defendant was not a tenant in the building (SM 6), so Lasky "frisked" him (SM 14). That frisk produced a small envelope which contained certain implements which in his judgment as a trained investigator of burglaries were burglars' tools (SM 8).

It seems to be the defendant's argument that because there was no search warrant, no consent on his part to be searched and no arrest, then the search was neither a search pursuant to a warrant, a consent or incidental to a lawful arrest. With each of these arguments, for the purpose of this argument only, we agree. We insist, however, that the frisk and the unlawful material which it produced were altogether authorized by the opinion of the Court of Appeals in *People v. Rivera*, supra. Although this particular incident occurred on July 10, 1964, some ten days after the effective date of the so-called stop and frisk law, we would prefer not to place our reliance on that section of the Code of Criminal Procedure, because the pronouncements of the Court of Appeals in the *Rivera* case, supra, are so clearly in point. The Court ruled that suspicious conduct, per se, while not, perhaps, being of such consequence as to validate an arrest, is certainly proper cause for interrogating a person as to his actions in a public place, and then went on to say that a necessary adjunct of this right is the privilege of insuring the officer's own safety while he exercises the right of thus interrogating the suspicious person. There is no need to belabor the manifestly suspicious circumstances which prompted Lasky's behavior here. He heard a sound

at his door and, upon investigating it, observed two men pussyfooting through a hallway where they had no reasonable excuse for being. Perhaps more than anything else, the officer's conduct prior even to his leaving his apartment and encountering the defendant is significant. [fol. 38] Here we deal with a police officer of eighteen years' experience. His reaction is significant. Even before interrogating the defendant he had reported the defendant's presence there to the police (SM 4), and he had taken the precaution of arming himself (SM 5), even though only a few moments before he had been completely naked (SM 4), and the clothing he had put on presumably was minimal. Just as attorneys who perhaps would find it difficult to pass a Bar examination and physicians who might find requalifying for a medical license a problem can nevertheless manage to win law suits and cure people, so do policemen acquire over a period of years an acute sensitivity to crime and criminals. By this we do not mean to suggest to the Court that the validation for a search is to be found in the material it uncovers, but we do suggest that the the policeman's instinct in suspicious circumstances is best demonstrated, paradoxically enough, in the number of successful motions entertained by this and other courts for the suppression of condemning evidence.

It is respectfully submitted to the Court that while *People v. Rivera*, supra, remains the law in New York State and while our Court of Appeals is prepared to sustain the authority of a police officer to stop and interrogate a suspicious person in suspicious circumstances, and, if the officer deems it necessary for his own safety, to frisk that person, then this Court can do no less.

WHEREFORE, it is respectfully submitted that the motion to suppress the evidence disclosed by this search should be denied in each and every respect. If the Court should conclude that it be necessary to examine the Grand July minutes herein, they will be made available at the Court's request.

/s/ James J. Duggan

Sworn to before me this
7th day of October, 1964.

/s/ Alberta Lee McClure

ALBERTA LEE MCCLURE
Notary Public, State of New York
No. 60-2458300
Qualified in Westchester County
Term Expires March 30, 1965

[fol. 39]

IN THE COUNTY COURT,
WESTCHESTER COUNTY

[Title Omitted]

7909/64

71/126

REPLY AFFIDAVIT OF ROBERT S. FRIEDMAN—

October 8, 1964

STATE OF NEW YORK)

) SS.:

COUNTY OF WESTCHESTER)

ROBERT S. FRIEDMAN, being duly sworn, deposes
and says:

FIRST: That your deponent makes this affidavit in
reply to the affidavit of JAMES J. DUGGAN, Esq., made
in opposition to the instant motion.

SECOND: The People in opposing the granting of
the instant motion rely solely upon the case of *People v.
Rivera*, 14 N.Y. 2d 441, and although the People in their
affidavit state that they do not rely on Section 180-a of
the Code of Criminal Procedure, they inferentially refer
to that statute.

With all due respect to the learned counsel for the
People, your deponent submits to this Court that the
Rivera case can in no way be made applicable to the facts
in the instant case.

It must be noted that in *Rivera* the police officers were
on motor patrol in an area of the City of New York which
was experiencing a "crime wave", including crimes such
as "muggings, stick-ups, assaults, larcenies, burglaries".
The police officers in question at 1:30 a.m. in the dead of
night had the defendant Rivera, together with a com-
panion, under observation for some five (5) minutes. They
observed the defendant and his companion approach a
certain bar and grill in a furtive manner, look inside the
[fol. 40] window and then walk away. This action on the
part of the defendant and his companion was repeated

several times until the defendant and his companion observed the police officers, whereupon they started to rapidly walk away from the scene. Thereafter the police officers accosted the defendant and his companion. Upon frisking the defendant Rivera on the outside of his clothing, one of the police officers felt a hard object which he thought to be a gun inside of the defendant's rear pocket. The police officer then removed from the defendant Rivera's person a loaded revolver.

In the instant case the search of the defendant took place at 1:00 o'clock in the afternoon in the hallway of a quiet residential apartment which is *not* located in an area noted for its "muggings, stick-ups, assaults, larcenies, burglaries, etc." Moreover, the totality of OFFICER LASKY'S observations was to the effect that he saw two (2) men tiptoeing in the hallway of his apartment building. These observations, unlike the observations in the Rivera case, were insufficient to justify even the wildest suspicion or surmise in the officer's mind that the defendant was about to commit or might possibly be about to commit some illegal act or action. Walking through a hallway in the middle of the afternoon, irrespective of the manner of your gait, can scarcely be considered a suspicious act.

The police officer's "frisk" in the instant case, unlike the *Rivera* case, did not indicate to the police officer that the defendant was possessed of a weapon. This is clearly demonstrated by the cross-examination of the police officer had on the preliminary hearing. On pages 14-15 of the Stenographer's Transcript the following questions and answers were had:

"Q Did your frisking reveal a weapon?

A I felt something hard.

Q Did it have the shape of a gun?

MR. CAPUTO: I object.

THE COURT: Overruled.

[fol. 41] THE COURT: You felt something hard in his pocket. Did it seem like a gun?

A. No.

MR. FRIEDMAN RESUMES EXAMINATION:

Q Did it seem to be the envelope that was recovered?

A I didn't know what it contained.

Q Did it seem like some other weapon?

A It could have been.

Q Did it feel like a knife?

A It may have.

Q Did it feel like a knife?

A It could have been a knife.

Q Were you able to feel the length of this object before you took it out of the defendant's pocket?

MR. CAPUTO: I object.

THE COURT: Overruled. Now, proceed Counsel.

Q *Were you able to feel the length of this object, this hard object which you say was in the defendant's pocket?*

A No.

Q *Were you able to feel as to its width?*

A No.

Q Did you remove this object from his pocket?

A I did.

Q Was it the first thing you removed from the defendant's person?

[fol. 42] A Yes.

Q At that point, just prior to the time you removed the envelope from the defendant's pocket, did you say to him in so many words, you are under arrest?

A I don't recall.

Q Prior to the time you opened the envelope did you say to Mr. Peters that he was under arrest?

A No, I didn't.

Q Did you put this plastic envelope into your pocket?

A I did."

(Emphasis supplied)

It is clear from the police officer's own testimony that he knew that the defendant was not armed at the time he completed the "external frisk". Yet despite this fact, he continued his exploratory search.

The product of the police officer's search was an opaque envelope which he removed from the defendant PETERS' person. Page 10 of the Stenographer's Minutes of the preliminary hearing makes quite clear the fact that the police officer had no knowledge of what was in the opaque envelope removed from the defendant's person prior to the time that he opened it, for he said:

"Q Did you ask permission of the defendant before you searched him?

A No, I didn't.

Q The envelope in which these particular items were found is an opaque piece of plastic which you cannot see through. Is that correct?

A Yes.

Q When you removed this envelope from the defendant's pocket you were not able to see what the contents were, is that right?

A That's right."

[fol. 43] Even if one would concede, which counsel does not, that the officer's action in "frisking" the defendant was proper, any further proceedings on his part coming as they did in the absence of a finding of a weapon and in the absence of permission to conduct a search, in the absence of a warrant of arrest or a lawful arrest, can only constitute a most flagrant violation of the Fourth Amendment to the United States Constitution and the defendant's rights thereunder.

That the search in the instant case far exceeded the permissible bounds delineated by the Court in *Rivera* is clearly set forth by the Court of Appeals in describing that search. JUDGE BERGAN, speaking for the Court, stated at page 463 that:

"... The frisk as it is described in the actual events that occurred in this case, however, and as it is generally understood in police usage, is a contact or patting of the outer clothing of a person to detect by the sense of touch if a concealed weapon is being carried.

It is something of an invasion of privacy; but so is the stopping of the person on the street in the first

place something of an invasion of privacy. The frisk is less such invasion in degree than an initial full search of the person would be. It ought to be distinguishable also on pragmatic grounds from the degree of constitutional protection that would surround a full-blown search of the person.

That kind of search would usually require sufficient evidence of a committed crime to justify an arrest or be an incident to a lawful arrest (*Harris v. United States*, 331 U.S. 145, 67 S.Ct. 1098, 91 L.Ed. 1399 (1947)."

Certainly there were no facts in the instant case to justify a "full-blown search" of the defendant's person. Surely, the finding of an opaque envelope could not give the officer authority to inspect its contents. Nor can the finding of that envelope reasonably give rise to an inference that the police officer was concerned for his personal safety, so that the search and seizure in the instant case clearly cannot be predicated upon the reasoning of *Rivera* or Section 180-a of the Code of Criminal Procedure.

[fol. 44] With reference to Section 180-a of the Code of Criminal Procedure, counsel, without delving into the question of the constitutionality of that statute, desires to point out to this Court that, even if we assumed *arguendo* that said statute were constitutional, a reading of the statute clearly indicates that on its face it is not applicable to the facts in the instant case and that OFFICER LASKY'S search certainly exceeded the permissible bounds of that statute. In all events, it is called to the Court's attention that the People have stated that they do not rely upon the authority of that statute.

In view of the foregoing, counsel respectfully submits that the "frisk" in the instant case far exceeded the permissible bounds as expounded by the Court of Appeals in *Rivera* and as permitted by Section 180-a of the Code of Criminal Procedure. Accordingly, and in view of the People's concession, contained on page 2 of the affidavit in opposition, that the search of the defendant was not made pursuant to a warrant or pursuant to defendant's consent or pursuant to a lawful arrest, the only conclusion that can be had is that the search and seizure in the

instant case was illegal and was violative of the defendant's constitutional rights insuring him and all other citizens protection against unreasonable searches and seizures.

WHEREFORE, your deponent respectfully prays that an order be made and entered herein granting the defendant the relief as prayed for in the Notice of Motion herein.

/s/ Robert S. Friedman
ROBERT S. FRIEDMAN

Sworn to before me this
8th day of October, 1964.

/s/ Martin S. Friedman
Notary Public

MARTIN S. FRIEDMAN
Notary Public, State of New York
No. 44-1326965
Qualified in Rockland County
Commission Expires March 30, 1965

[fol. 45] IN THE COUNTY COURT,
WESTCHESTER COUNTY

HON. JOHN H. GALLOWAY, JR., County Judge

THE PEOPLE OF THE STATE OF NEW YORK

-against-

JOHN FRANCIS PETERS, DEFENDANT

7909/64
71/126

OPINION—October 30, 1964

Defendant moves to suppress certain evidence (what appears to have been a set of burglar's tools), and also to inspect the Grand Jury Minutes or for dismissal of the indictment for insufficiency of legal evidence in support thereof, if the court reads the minutes. As a result of the events hereinafter related defendant was indicted for felonious possession of burglar's tools in violation of Section 408 of the Penal Law.

The facts before us, as disclosed on the preliminary hearing in the Mount Vernon Court of Special Sessions, are these: On July 10, 1964 at about one o'clock in the afternoon, Samuel Lasky, an off-duty police officer of New York City, of eighteen years' experience, was at home in his apartment in Mount Vernon, when he heard a noise at his door, on the sixth floor of a multiple dwelling, housing 120 tenants served by elevators. He saw through the peep-hole of his door two men, one of them the defendant, Peters, tiptoeing out of an alcove on the sixth floor toward the stairway. He called police headquarters and reported the incident. He returned to his peep-hole and saw the two men still tip-toeing from the alcove toward the stairway. With his service gun in hand he slammed his door after him, ran down the hallway and then down the stairs down which Peters and the other man were running, and "collared" Peters between the fifth and fourth floors.

[fol. 46] Lasky, who had never before seen the defendant as a tenant or otherwise in the apartment building, asked Peters what he was doing in the building. He said he was looking for a girl friend; and, when asked for her name, he said she was a married woman and declined to state her name. Lasky then frisked Peters, looking for a weapon, he said. He "felt something hard" in Peters' right pants pocket, which he said did not seem like a gun, but which "could have been a knife". He took out of Peters' pocket an opaque plastic envelope, the contents of which he examined, and found to consist of "6 picks and 2 Allen wrenches with the short leg filed down to a screw-driver edge, and a tension bar". Lasky said that, on his experience as a police officer in the investigation of burglaries, the items in the envelope were adaptable to the commission of burglaries.

During all of this Lasky was not in uniform, did not have his barge on, did not tell Peters he was a police officer or that he, Peters, was under arrest—prior to opening the plastic envelope, which he ultimately turned over to the Mount Vernon police, who had meanwhile arrived and taken the defendant into custody.

Defendant, who says he was visiting the premises to visit a friend, a lady friend, claims that after Lasky had collared him and pointed a revolver at him, and asked him what he was doing in the building, he started searching his person, and removed the plastic envelope from his possession. Peters urges that this constituted an unreasonable search and seizure and that the items so seized should be suppressed and excluded from evidence as being the fruits of an illegal search and seizure, since officer Lasky had no reason or probable cause to believe that a [fol. 47] crime had been committed, or was being committed, or that Peters had committed or was committing an illegal act.

The District Attorney resists the motions on the ground that the frisk and the burglar's tools which it produced were authorized by the recent decision of the Court of Appeals in *People v. Rivera*, 14 N.Y. 2d 441. The District Attorney prefers not to rely for authorization of Lasky's action on the recently enacted "Stop and Frisk"

statute (*Section 180-a, Code of Criminal Procedure*, added by L.1964, ch. 86, effective July 1, 1964), which provides:

"1. A police officer may stop any person abroad in a public place whom he reasonably suspects is committing, has committed or is about to commit a felony or any of the crimes specified in section five hundred fifty-two of this chapter, and may demand of him his name, address and an explanation of his actions.

2. When a police officer has stopped a person for questioning pursuant to this section and reasonably suspects that he is in danger of life or limb, he may search such person for a dangerous weapon. If the police officer finds such a weapon or any other thing the possession of which may constitute a crime, he may take and keep it until the completion of the questioning, at which time he shall either return it, if lawfully possessed, or arrest such person."

The motion to suppress thus raises these questions: 1. As to the right of a police officer to stop a person in a public place and question him for an explanation of his actions, under circumstances that would reasonably actuate investigation and inquiry; 2. as to the right of such officer to frisk the person being questioned as an incident to the inquiry; and 3. as to the admissibility of the evidence obtained by the "frisk".

A police officer on "off duty" status is nevertheless not relieved of his obligation as an officer to preserve the public peace and to protect the lives and property of the citizens of the public in general. How fortunate society is and has been that "off-duty" police officers have traditionally recognized this obligation, has been demonstrated on innumerable occasions in many communities when such officers have risked and sacrificed their lives to frustrate the commission of crime or to bring the perpetrator of crime to justice.

We are unable to accept the view which tends to deprecate, if not altogether to reject, as rank suspicion or an educated guess unworthy of acceptance, the experienced police officer's intuitive knowledge and appraisal of the

appearances of criminal conduct or action, accomplished or in the course of accomplishment, as one of the factors in reasonable cause for police action. In our opinion officer Lasky was properly acting as a police officer on the occasion here involved.

In determining the validity of the police action in this case, we believe the prescribed standards of initial action and the grounds and scope of the invasion of the person questioned to be applied are those contained in Section 180-a of the Code, since the action here involved was subsequent to the effective date of the "stop and frisk" statute.

In our opinion a person moving in the public halls and stairways of a fairly large apartment house is a "person abroad in a public place" within the statute's ambit. We also believe that the conduct of Peters and his companion, as observed by Lasky, under the circumstances described, furnished adequate grounds for Lasky to reasonably suspect that Peters was committing or had committed or was about to commit a felony or a crime specified in Section 552 of the Code. We think the testimony at the hearing does not require further laboring of this aspect of the matter, unless one is to believe that it is legitimately normal for a man to tip-toe about in the public hall of an apartment house while on a visit to his unidentified girl-friend, and, when observed by another tenant, to [fol. 49] rapidly descend by stairway in the presence of elevators. This is unacceptable to reason.

Having the required reasonable suspicion of Peters, officer Lasky was entitled under the statute to stop him and demand an explanation of his actions. Lasky's action in "collaring" Peters to stop him as he moved rapidly down the stairs was allowable under the circumstances. And, of course, he was entitled to demand, as he did, that Peters explain his actions. We believe that Peters' explanation was clearly unsatisfactory, and that under the circumstances Lasky's action in frisking Peters for a dangerous weapon was reasonable, even though Lasky was himself armed.

During the course of the external frisking of Peters' clothing the officer felt in his trouser pocket a hard object

which, we believe, he reasonably suspected might be a weapon, such as a knife, even though admittedly it did not feel like a gun. He had not yet arrested Peters when he withdrew the packet containing the alleged burglar's tools which we believe he properly opened in his search for a dangerous weapon. In view of the character of the implements in the envelope or packet, Lasky properly retained these items, the possession of which may have constituted a crime, and thereafter properly turned Peters over for arrest by the Mount Vernon police there present.

We conclude that officer Lasky was authorized under Section 180-a of the Code to stop and question Peters and to frisk him, under the circumstances here shown, and to retain the product of the frisk; that the standards of his initial action and the grounds and scope of his subsequent action met the requirements of the statute; that the product of the frisk was therefore legally obtained; and that consequently that product constituting evidence of felonious possession of burglar's tools is not subject to [fol. 50] suppression and exclusion. We further conclude that the police action here involved was within the standards enunciated by Judge Bergan in *People v. Rivera*, 14 N.Y. 2d 441, supra, and was authorized by the decision of the Court of Appeals in that case. The motion to suppress must be denied.

We now consider defendant's motion for leave to inspect the Grand Jury minutes as a basis for dismissal of the indictment for insufficiency of legal evidence to sustain it. His argument is, of course, grounded wholly on the exclusion of the packet of alleged burglar's tools, which would result in such insufficiency. In view of our denial of the requested suppression, the motion to inspect is denied.

Submit order on notice in accordance herewith.

Dated: WHITE PLAINS, NEW YORK
October 30, 1964

/s/ John H. Galloway, Jr.
JOHN H. GALLOWAY, JR.
County Judge of
Westchester County

HON. LEONARD RUBENFELD
District Attorney
County of Westchester

JAMES J. DUGGAN, ESQ.
Ass't. District Attorney
County of Westchester

ROBERT S. FRIEDMAN, ESQ.
Attorney for Defendant
172 South Broadway
White Plains, New York

[fol. 50 A]

[File Endorsement Omitted]

[fol. 51] IN THE COUNTY COURT,
 WESTCHESTER COUNTY

* * * *

PRESENT:

HONORABLE JOHN H. GALLOWAY, JR.
County Judge

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT

-against-

JOHN FRANCIS PETERS, DEFENDANT

7909/64

71/126

ORDER DENYING MOTION TO SUPPRESS—

December 18, 1964

The defendant having moved the Court for an order suppressing certain evidence, and for an order permitting the defendant to inspect the Grand Jury Minutes or in the alternative for an order dismissing the indictment herein for insufficiency of legal evidence,

Now upon reading and filing the Notice of Motion herein, with proof of due service thereof, the affidavits of ROBERT S. FRIEDMAN, Esq., and JOHN FRANCIS PETERS, in support of said motion, and the affidavit of JAMES J. DUGGAN, Esq., in opposition thereto, and the motion having been fully submitted to the Court, it is hereby,

ORDERED, that the said motion be and the same is hereby in all respects denied.

ENTER:

/s/ John H. Galloway, Jr.
J.C.C.

[fol. 51 A]

[File Endorsement Omitted]

[fol. 52] IN THE COUNTY COURT,
WESTCHESTER COUNTY

THE PEOPLE OF THE STATE OF NEW YORK

-against-

JOHN FRANCIS PETERS, DEFENDANT

Index # 7909/1964

71/126

CERTIFICATE OF REASONABLE DOUBT—January 13, 1965

I, ROBERT J. TRAINOR, a Judge of the County Court of the County of Westchester, State of New York, who presided at the entry of the judgment of conviction of JOHN FRANCIS PETERS, the above-named defendant, on an indictment charging the said JOHN FRANCIS PETERS with the crime of violating Section 408 of the Penal Law of the State of New York, and who was convicted of said crime by the entry of his plea of guilty on the 17th day of November, 1964, do hereby certify that, in my opinion, there is reasonable doubt whether said judgment should stand.

My reasons for such opinion, and the questions which I deem of sufficient importance for review by the Appellate Court, are as follows:

- (1) A substantial question of law exists as to whether or not the defendant's motion for the suppression of evidence was properly denied.
- (2) A substantial question of law exists as to whether or not, in determining defendant's motion to suppress evidence, the Court erred in relying upon Section 180-a of the Code of Criminal Procedure, in that
 - (a) A question exists as to whether or not the defendant was a person "abroad in a public place" within the purview of said statute.
 - (b) A substantial question exists as to whether or not the police officer had reason to suspect that the defendant was committing or had committed or was about to commit a felony or any of the crimes specified in Section 552 of the Code of Criminal Procedure.

[fol. 53]

- (c) A substantial question exists as to whether or not there were facts which would permit the police officer to reasonably suspect that he was in danger of life or limb.
- (d) A substantial question exists as to whether or not the police officer's search exceeded the bounds of a search for a dangerous weapon, and exceeded the bounds permitted by Section 180-a of the Code of Criminal Procedure.
- (e) A substantial question exists as to whether or not Section 180-a of the Code of Criminal Procedure is, on its face, contrary to and in violation of the express provisions of the Constitution of the United States of America.
- (f) A substantial question exists as to whether or not Section 180-a of the Code of Criminal Procedure abrogates the right of the people to be secure in their person against unreasonable searches and seizures, as provided for by the Fourth Amendment to the Constitution of the United States of America.
- (g) A substantial question exists as to whether or not Section 180-a of the Code of Criminal Procedure violates the Fourteenth Amendment of the Constitution of the United States of America, in that it permits police officers on the basis of vague, arbitrary, capricious and unreasonable standards to conduct unreasonable searches of the persons of citizens of the United States of America, all without the due process of law.

DATED: White Plains, New York
January 13th, 1965

/s/ Robert J. Trainor
Judge of the County Court of
the County of Westchester

[fol. 53 A]

[File Endorsement Omitted]

[fol. 54] In the Appellate Division of the Supreme Court of the State of New York held in and for the Second Judicial Department at the Borough of Brooklyn.

PRESENT—

HON. ARTHUR D. BRENNAN, Acting Presiding Justice.

“ L. BARRON HILL, Justices.

“ SAMUEL RABIN,

“ JAMES D. HOPKINS,

“ A. DAVID BENJAMIN,

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT

v.

JOHN FRANCIS PETERS, APPELLANT

ORDER ON APPEALS FROM JUDGMENT ETC.—

December 5, 1965

The above named John Francis Peters, defendant in this action having appealed to the Appellate Division of the Supreme Court from a judgment of the County Court, Westchester County, rendered January 4, 1965 on a plea of guilty, convicting him of the unlawful possession of burglar's instruments as a misdemeanor (Penal Law, Section 408) and imposing sentence, and the defendant having also appealed "from each and every intermediate order therein made," and the said appeals having been argued by Mr. Robert S. Friedman, of Counsel for appellant and by Mr. James J. Duggan, Assistant District Attorney, of Counsel for respondent; and the appeal from the intermediate order having been reviewed upon the appeal from the judgment of conviction, as no separate appeal lies from said order, and due deliberation having been had thereon; and upon the opinion and decision slip of the court herein, heretofore filed and made a part hereof:

It is Ordered and Adjudged that the judgment of conviction so appealed from be and the same hereby is unanimously affirmed.

Enter:

/s/ JOHN J. CALLAHAN
Clerk

[fol. 55]

[Clerk's Certificate to foregoing
paper omitted in printing.]

[fol. 56]

[Triple Certificate to foregoing
paper omitted in printing.]

[fol. 57]

IN THE COURT OF APPEALS
OF THE STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT

v.

JOHN FRANCIS PETERS, APPELLANT

OPINION—Decided July 7, 1966

* * * *

KEATING, J. Samuel Lasky was for 18 years a patrolman in the New York City Police Department and for 12 years resided on the sixth and top floor of a Mount Vernon apartment house. At about one o'clock on the afternoon of July 10, 1964, Lasky stepped out of the shower and heard a noise at his front door. Before he could investigate, his phone rang and he answered it. After he completed the call, he went to the door and through the peephole he observed two men tiptoeing about the hallway. He went back to the telephone, called the Mount Vernon police, dressed (not in uniform) and re-

turned to the door where he observed the two men tiptoeing toward the stairway. Armed with his gun, he slammed his door and followed the footsteps he heard running down the stairway.

Officer Lasky apprehended defendant—whom he did not recognize as being a tenant—between the fifth and fourth floors and asked him what he was doing in the building. Defendant claimed to be looking for a girl friend but refused to identify her because he said she was a married woman. Unimpressed with defendant's apparent chivalry, Lasky brought him to the fourth floor and frisked him for a weapon by tapping his groin pockets and under his arms. He felt something hard which "could have been a knife" and from the right pants pocket he withdrew an unsealed opaque plastic envelope. Upon examination the envelope was found to contain six picks, two Allen wrenches with [fol. 58] the short leg of each filed down to a screwdriver edge and a tension bar. These, from his 18 years' experience, Lasky instantly recognized as burglar's tools. Lasky then went back to the sixth floor doorway from which defendant had come but was satisfied that the two men had not gotten in. He took defendant down to the manager's office and turned him and the envelope over to Mount Vernon police.

Defendant's motions to suppress the evidence and to dismiss his indictment for unlawful possession of burglar's tools were denied. He was then convicted upon his plea of guilty.

On this appeal defendant contends that the evidence of the tools was the result of an unlawful search and seizure and was inadmissible. Specifically, he argues that (1) the rationale of *People v. Rivera* (14 N Y 2d 441) is inapplicable and (2) section 180-a of the Code of Criminal Procedure, if applicable, is unconstitutional.

Though *Rivera* (*supra*) was decided after the passage of section 180-a, the statute was not in effect at the time the events took place. We hold that the rationale of *Rivera* is applicable to the instant case so that even without the aid of the statute, the seizure of the burglar's tools was legal.

In *Rivera* we divided the problem into two stages: the legality of the detention and the legality of the frisk.

With regard to the former, we noted (p. 444) that it is the business of police to *prevent* crime and that prompt inquiry into "suspicious or unusual street action" is an indispensable police power "And the evidence needed to make the inquiry is not of the same degree or conclusiveness as that required for an arrest. The stopping of the individual to inquire is not an arrest and the ground upon which the police may make the inquiry may be less incriminating than the ground for an arrest for a crime known to have been committed" (p. 445).

The suspicious circumstances in this case warranted Officer Lasky's stopping defendant and inquiring as to his presence in the building. Though *Rivera* happened "in the streets", the power of inquiry is not limited to the streets. It is the reasonableness of the officer's suspicion which is determinative and the place where the events transpire is only one factor in weighing this suspicion.

In the instant case Lasky twice observed two men, whom, as a 12-year resident, he did not recognize as belonging in the building, tiptoeing around the top floor of an apartment house. When his door slammed, they hastily exited by the stairway, not the elevator.

Such circumstances are reasonably suspicious and the common law has long recognized the right of law officers in such a situation to make the limited intrusion of asking one for an explanation of his actions (see citations in [fol. 59] *Rivera, supra*, p. 446). In detaining defendant, Lasky was performing his duty and exercising a reasonable and necessary police power for the prevention of crime and the preservation of the public order. As the trial court noted, an off-duty policeman is not relieved of his obligation to preserve the peace or protect the lives and property of citizens. The acceptance of this duty has been demonstrated on numerous occasions when such officers have risked and sacrificed their lives to frustrate the commission of crime or to bring the perpetrator of crime to justice.

The second question in *Rivera* was whether the police could properly frisk defendant and seize something, the possession of which constituted a crime. Since the limited detention for the purposes of inquiry was found to be a

necessary adjunct to the prevention and discovery of crime, we further recognized that the answer to such an inquiry might be a bullet—in any event the exposure to danger could be very great. The frisk is a reasonable and constitutionally permissible precaution to minimize that danger. Since the frisk was held to be legal, the seizure of the evidence of a crime which was thereby discovered was also legal and the motion to suppress should have been denied.

It is well-recognized that the basis for a frisk is the concern for the well-being of the officer. Officer Lasky was in at least as dangerous a situation as was the officer who arrested Rivera, and probably more so. In *Rivera*, though it was nighttime, there were three policemen present and only two suspects and the frisking took place on a wide street. In this case a single officer collared a single defendant in the narrow confines of a stairway. Moreover, there was a second suspect still on the loose, perhaps still in the stairway. In such a situation the tables are easily turned, especially if the suspect possesses a dangerous weapon. Not only was Lasky's frisk legal, it was necessary—it would have been extremely poor police work *not* to have frisked the defendant in such a situation.

The fact that the frisk produced an envelope containing burglar's tools rather than a knife is not determinative. As we said in *Rivera*, "The fact that the police detective actually found a gun in defendant's possession is neither decisive nor material to the constitutional point in issue. The question is not what was ultimately found, but whether there was a right to find anything" (p. 447).

Lasky was in a potentially dangerous situation wherein a frisk was warranted. Touching an object which may have been a knife he was just as warranted in removing it as was the officer who removed Rivera's gun. Holding the unsealed envelope, Lasky was warranted in examining it for a knife just as he would be warranted in opening a holster to see if it had a gun. Once he saw the tools, [fol. 60] he had probable cause for arrest and was obviously entitled to seize them, as did the officer who seized Rivera's gun. Thus this case is wholly within the limits of *Rivera* and is a reasonable exercise of police power.

Turning next to section 180-a, it is apparent that there is not a great deal of difference between the statute and the standards used in *Rivera*. It is also apparent that the statute is applicable to the present facts. The hallways and stairways of large multiple dwellings, where delivery men, service men, visitors and other strangers are continually moving, must be considered public places within the statute. This is as it should be, considering the alarming number of elevator muggings, courtyard attacks and "second story" burglaries.

The statute makes it clear that the Legislature did not intend the stopping and frisking to be an arrest. Nor, as we pointed out in *Rivera*, does the intrinsic nature of the activity make it an arrest. Detention for a short and reasonable period in order to question is not an arrest, and such a right of inquiry was rooted in early English practice and approved by the common-law courts and commentators. (*United States v. Vita*, 294 F. 2d 524, 530.) As LUMBARD, C. J., noted in *Vita*, the line between detention and arrest is a thin one but a necessary one if there is to be any effective enforcement of the criminal law. For it not only aids the police but also protects those who are readily able to exculpate themselves from being arrested and having charges preferred against them before their explanations are considered.

Of course there must be an adequately defined standard for the authorization of the detention and the Legislature has provided one. The phrase "reasonable suspicion" provides a defined standard and is, in fact, no less endowed with an objective meaning than is the phrase "probable cause." Courts will have no difficulty in applying this standard and have frequently in the past referred to "suspicion" or "reasonable suspicion" as terms with a definite meaning, somewhat below probable cause on the scale of absolute knowledge of criminal activity.

Not only are we satisfied that "reasonable suspicion" is an adequate standard, we are also satisfied that the actions which it authorizes are constitutionally reasonable. For in the last analysis the constitutionality of the statute is determined not so much by the language employed as by the conduct it authorizes. The conflict between the

desire to be free from any police detention and the long-recognized need for police inquiry must be resolved by striking a fair balance. By requiring the reasonable suspicion of a police officer, the statute incorporates the experienced police officer's intuitive knowledge and appraisal of the appearances of criminal activity. His evaluation of the various factors involved insures a protective, as well as definitive, standard.

[fol. 61] In addition to the detention which is authorized, the officer is allowed to frisk the suspect if he reasonably suspects that he is in danger of life or limb. Again the standard is the reasonable suspicion of the officer. The frisk, as it was described in this case and as it is generally understood, involves the patting of the exterior of one's clothing in order to detect by touch the presence of a concealed weapon. In *Rivera*, we went to some length to distinguish a frisk from a full search: "It is something of an invasion of privacy; but so is the stopping of the person on the street in the first place something of an invasion of privacy. The frisk is less such invasion in degree than an initial full search of the person would be. It ought to be distinguishable also on pragmatic grounds from the degree of constitutional protection that would surround a full-blown search of the person" (p. 446).

The frisk is necessary on grounds of elemental safety. Even when the police officer has the upper hand, the tables are easily turned. The policeman should not be forced to deal with the possibility of a suspect's going for a concealed weapon where he reasonably suspects the presence of such weapon. In this case Lasky was not trying to intimidate defendant nor was he merely trying to be a hero. He was acting, if not *beyond* the call of duty, at least on the fringe of duty. Before going after defendant he phoned the local police.

This officer is deserving of our highest praise. The Legislature has determined that such acts by police officers should not be discouraged by unnecessarily exposing them to the dangers of concealed weapons. Since a frisk is necessary to remove this danger and since it is less of an invasion than a full search, it is just that such a frisk

may be warranted upon grounds which would not sustain a full search—i.e., grounds less than probable cause.

If, as in this case, the frisk discloses something, other than a weapon, the possession of which is a crime, the statute requires the officer to return it or make an arrest. As long as the detention was proper and the frisk did not exceed its necessary and normal bounds, there is no reason to deny to the police the use of this evidence. If an arrest is to be made, the protective standard of reasonable cause must be met.

Thus, the effect of the statute is to set standards which will govern the police power of limited detention and the limited search known as a frisk. Where a person's activities are perfectly normal, he is fully protected from any detention or search. Where a person's activities, together with facts and circumstances of which a police officer has reasonably trustworthy information, are sufficient to warrant a reasonably cautious officer to suspect the person of committing or being about to commit certain crimes, that person may be detained and asked for [fol. 62] his name, address and an explanation of his activities. Where such a person has been detained and the facts and circumstances warrant the reasonable officer in suspecting that he is in danger of life or limb, the person may be searched for a dangerous weapon in the least obtrusive manner. Finally, where a person's activities and the facts and circumstances of which the police have reasonably trustworthy information are sufficient to warrant an officer of reasonable caution to believe that a crime is being or was committed, the police may arrest and fully search such a person.

Stripped to the barest essentials, "probable cause" requires satisfactory grounds for *believing* that a crime was committed, while "reasonable suspicion" requires satisfactory grounds for *suspecting* that a crime was committed. The difference between these two standards is proportionate to the difference in degree of invasion between an arrest and a detention, between a full search and a frisk. Such a difference in standards is both reasonable and desirable.

The attempt to apply a single standard of probable cause to all interferences—i.e., to treat a stop as an arrest

and a frisk as a search—produces a standard either so strict that reasonable and necessary police work becomes unlawful or so diluted that the individual is not adequately protected. The varying standards now in effect through our decision in *Rivera* and through section 180-a best resolve this problem.

The Fourth Amendment protects not against *all* searches and seizures but “against *unreasonable* searches and seizures”. The doctrine of “stop and frisk upon reasonable suspicion” does not produce unreasonable searches and seizures. It gives effect to the principle that the grounds for a stop should be reasonable in light of the degree of interference it represents.

In the recent case of *Ker v. California*, eight Justices agreed on that part of the opinion which stated: “The States are ~~not~~ thereby precluded from developing workable rules governing arrests, searches and seizures to meet ‘the practical demands of effective criminal investigation and law enforcement’ in the States, provided that those rules do not violate the constitutional proscription of unreasonable searches and seizures and the concomitant command that evidence so seized is inadmissible against one who has standing to complain” (374 U. S. 23, 34).*

By judicial action in *Rivera* and legislative action in section 180-a, our State has developed a reasonable and workable set of rules governing arrest, search and seizure. These rules are similar to those adopted in several other States, notably California whose criminal problems in [fol. 63] large urban areas are similar to ours: (See *People v. Martin*, 46 Cal. 2d 106; also *Kavanagh v. Stenhouse*, 93 R. I. 252, and *Commonwealth v. Lehan*, 347 Mass. 197.) Under these rules Officer Lasky properly executed his duties as a police officer and the motion to suppress was properly denied.

The judgment of the Appellate Division should be affirmed.

* The ninth, Justice HARLAN, favored an even sharper demarcation between Federal searches and seizures and State searches and seizures, thus giving the States still greater leeway to determine the needs of their law enforcement agencies.

FULD, J. (dissenting). As I understand the Fourth Amendment, a search, not authorized by consent or a search warrant, is deemed reasonable only if conducted as incident to a lawful arrest which, at the very least, must be based upon "probable cause" for believing that the defendant has committed or is committing a crime. (See, e.g., *Rios v. United States*, 364 U. S. 253, 261-262; *Henry v. United States*, 361 U. S. 98, 100-102.) The requirement of probable cause may not be avoided by labeling the police tactic a "frisk" or calling it a "mere" search for dangerous weapons. Absent grounds for a lawful arrest—that is, probable cause—the possibility, or even "strong reason to suspect" (*Henry v. United States*, 361 U. S. 98, 101, *supra*), that an individual possesses contraband of any sort does not furnish a sufficient predicate for conducting a search. Nor does the fact that the law enforcement authorities may stop and question a suspicious-appearing person on less than probable cause justify a search. Its validity depends not upon the legality of the detention but rather upon the existence of probable cause. (Cf. *United States v. Rabinowitz*, 339 U. S. 56, 62-63; *Carroll v. United States*, 267 U. S. 132, 154.) In the case before us, there was admittedly no such probable cause and, consequently, the search and seizure were unlawful. Indeed, the unlawfulness of the search, the violation of constitutional right, is exacerbated by the fact that the evidence, which was taken from the defendant's person and became the sole basis for the prosecution, was not a gun or other weapon but burglar's tools.

Of course, there are risks inherent in investigatory activities undertaken by the police but, certainly, it does not follow from that that the police are privileged, absent probable cause, to search anyone who looks or acts suspiciously and to use against him any articles they may find on his person. As I previously observed, "Other methods are available whereby the police may protect themselves while carrying on their investigations, other procedures which, if utilized, will safeguard the police and the community from the criminal minority without destroying the sense of dignity and freedom with which the law-abiding majority walk the streets." (*People v.*

Rivera, 14 N Y 2d 441, 452 [dissenting opinion], cert. den. 379 U. S. 978.)

The defendant Peters undoubtedly merits punishment for possessing burglar's tools and, it may be urged, deserves little consideration. But I cannot forget that the rights and privileges guaranteed by the Constitution are assured to every individual, to the worst and meanest of [fol. 64] men as well as to the best and most upright. The Fourth Amendment guarantees "The right of the people to be secure in their persons", and nothing said in *Ker v. California* (374 U. S. 23, 34) about developing "workable rules" to meet the practical demands of effective criminal investigation could, in my opinion, have been intended to approve or sanction a search solely on the basis of suspicion. In authorizing such a search (on suspicion), section 180-a of the Code of Criminal Procedure represents more than a green light to abuse. As well illustrated by the present case, and even more graphically by *People v. Sibron* (*infra*, p. 603, also decided today), the statute is an outright invitation to evade the constitutional prohibition against unreasonable searches and to circumvent the exclusionary rule of *Mapp v. Ohio* (367 U. S. 643). Perhaps, as some believe, this may be desirable but, until the Supreme Court authoritatively declares that "reasonable suspicion" justifies a search without a warrant and that the police may "frisk" a suspect without probable cause and—as Judge VAN VOORHIS pointedly notes in the *Sibron* case (*infra*, p. 606)—conduct "a general search of the person", I choose to adhere to the views I expressed in *Rivera* (14 N Y 2d 441, 448, cert. den. 379 U. S. 978, *supra*) and in *People v. Pugach* (15 N Y 2d 65, 70, cert. den. 380 U. S. 936).

In sum, then, I believe that section 180-a, authorizing a search upon less than probable cause, is unconstitutional and that the trial court erred in permitting the articles found in the defendant's pockets to be admitted in evidence and used against him. The judgment of conviction should be reversed.

FULD, J. (dissenting). As I understand the Fourth Amendment, a search, not authorized by consent or a search warrant, is deemed reasonable only if conducted as incident to a lawful arrest which, at the very least, must be based upon "probable cause" for believing that the defendant has committed or is committing a crime. (See, e.g., *Rios v. United States*, 364 U. S. 253, 261-262; *Henry v. United States*, 361 U. S. 98, 100-102.) The requirement of probable cause may not be avoided by labeling the police tactic a "frisk" or calling it a "mere" search for dangerous weapons. Absent grounds for a lawful arrest—that is, probable cause—the possibility, or even "strong reason to suspect" (*Henry v. United States*, 361 U. S. 98, 101, *supra*), that an individual possesses contraband of any sort does not furnish a sufficient predicate for conducting a search. Nor does the fact that the law enforcement authorities may stop and question a suspicious-appearing person on less than probable cause justify a search. Its validity depends not upon the legality of the detention but rather upon the existence of probable cause. (Cf. *United States v. Rabinowitz*, 339 U. S. 56, 62-63; *Carroll v. United States*, 267 U. S. 132, 154.) In the case before us, there was admittedly no such probable cause and, consequently, the search and seizure were unlawful. Indeed, the unlawfulness of the search, the violation of constitutional right, is exacerbated by the fact that the evidence, which was taken from the defendant's person and became the sole basis for the prosecution, was not a gun or other weapon but burglar's tools.

Of course, there are risks inherent in investigatory activities undertaken by the police but, certainly, it does not follow from that that the police are privileged, absent probable cause, to search anyone who looks or acts suspiciously and to use against him any articles they may find on his person. As I previously observed, "Other methods are available whereby the police may protect themselves while carrying on their investigations, other procedures which, if utilized, will safeguard the police and the community from the criminal minority without destroying the sense of dignity and freedom with which the law-abiding majority walk the streets." (*People v.*

Rivera, 14 N Y 2d 441, 452 [dissenting opinion], cert. den. 379 U. S. 978.)

The defendant Peters undoubtedly merits punishment for possessing burglar's tools and, it may be urged, deserves little consideration. But I cannot forget that the rights and privileges guaranteed by the Constitution are assured to every individual, to the worst and meanest of [fol. 64] men as well as to the best and most upright. The Fourth Amendment guarantees "The right of the people to be secure in their persons", and nothing said in *Ker v. California* (374 U. S. 23, 34) about developing "workable rules" to meet the practical demands of effective criminal investigation could, in my opinion, have been intended to approve or sanction a search solely on the basis of suspicion. In authorizing such a search (on suspicion), section 180-a of the Code of Criminal Procedure represents more than a green light to abuse. As well illustrated by the present case, and even more graphically by *People v. Sibron* (*infra*, p. 603, also decided today), the statute is an outright invitation to evade the constitutional prohibition against unreasonable searches and to circumvent the exclusionary rule of *Mapp v. Ohio* (367 U. S. 643). Perhaps, as some believe, this may be desirable but, until the Supreme Court authoritatively declares that "reasonable suspicion" justifies a search without a warrant and that the police may "frisk" a suspect without probable cause and—as Judge VAN VOORHIS pointedly notes in the *Sibron* case (*infra*, p. 606)—conduct "a general search of the person", I choose to adhere to the views I expressed in *Rivera* (14 N Y 2d 441, 448, cert. den. 379 U. S. 978, *supra*) and in *People v. Pugach* (15 N Y 2d 65, 70, cert. den. 380 U. S. 936).

In sum, then, I believe that section 180-a, authorizing a search upon less than probable cause, is unconstitutional and that the trial court erred in permitting the articles found in the defendant's pockets to be admitted in evidence and used against him. The judgment of conviction should be reversed.

Chief Judge DESMOND and Judges BURKE, SCILEPPI and BERGAN concur with Judge KEATING; Judge FULD dissents and votes to reverse in an opinion; Judge VAN VOORHIS dissents and votes to reverse for the reasons stated in his dissenting opinion in *People v. Sibron* (18 N Y 2d 603, 604), decided herewith.

Judgment affirmed.

[fol. 65]

No. 43

[File Endorsement Omitted]

COURT OF APPEALS

STATE OF NEW YORK, SS:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 7th day of July in the year of our Lord one thousand nine hundred and sixty-six, before the Judges of said Court.

WITNESS,

The HON. CHARLES S. DESMOND, Chief Judge Presiding.
RAYMOND J. CANNON, Clerk.

REMITTITUR—July 7, 1966

[fol. 66]

2.

No. 43.

66

THE PEOPLE &C., RESPONDENT

vs.

JOHN FRANCIS PETERS, APPELLANT

Be it Remembered, That on the 31st. day of January in the year of our Lord one thousand nine hundred and sixty-six, John Francis Peters, the appellant—in this cause, came here unto the Court of Appeals, by Robert S. Friedman, his attorney—; and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And The People &c., the respondent—in said cause, afterwards appeared in

said Court of Appeals by Leonard Rubinfeld, District Attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

[fol. 67] Whereupon, The said Court of Appeals having heard this cause argued by Mr. Robert S. Friedman, of counsel for the appellant—, and by Mr. James J. Duggan, of counsel for the respondent—, brief filed by amicus curiae, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the County Court, Westchester County, there to be proceeded upon according to law.

[fol. 68] Therefore, it is considered that the said judgment be affirmed, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the County Court, Westchester County, before the Judges thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said County Court, before the Judges thereof, &c.

/s/ Raymond J. Cannon
Clerk of the Court of Appeals of
the State of New York.

Court of Appeals, Clerk's Office,
Albany, July 7, 1966.

[Clerk's Certificate to foregoing
paper omitted in printing.]

[fol. 69]

IN THE COUNTY COURT,
WESTCHESTER COUNTYIndex No. 7909/64
71/126

JOHN FRANCIS PETERS, APPELLANT

-against-

PEOPLE OF THE STATE OF NEW YORK

NOTICE OF APPEAL TO THE SUPREME COURT OF THE
UNITED STATES—September 7, 1966

I. Notice is hereby given that JOHN FRANCIS PETERS, the appellant above named, hereby appeals to the Supreme Court of the United States from the final order of the Court of Appeals of the State of New York, entered on the 7th day of July, 1966, affirming the judgment of conviction rendered against the appellant on the 4th day of January, 1965, convicting the appellant of the crime and misdemeanor of unlawfully possessing burglar's instruments.

This appeal is taken pursuant to 28 U.S.C. Section 1257(2).

Appellant was convicted of the crime of unlawfully possessing burglar's instruments in violation of Section 408 of the Penal Law of the State of New York, and was sentenced to a term of one (1) year confinement in the Westchester County Penitentiary and is presently enlarged on bail in the sum of Fifteen Hunderd (\$1500) Dollars.

II. The clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

[fol. 70]

1. Original Indictment.
2. Notice of Motion to Suppress, Etc.
3. Affidavit of John Francis Peters, Read in Support of Motion to Suppress, Etc.

4. Affidavit of Robert S. Friedman, Read in Support of Motion to Suppress, Etc.
5. Minutes of Hearing, Read in Support of Motion to Suppress, Etc.
6. Affidavit of James J. Duggan, Read in Opposition to Motion to Suppress, Etc.
7. Reply Affidavit of Robert S. Friedman, Read in Support of Motion to Suppress, Etc.
8. Opinion on Motion to Suppress, Etc.
9. Order Denying Motion to Suppress, Etc.
10. Order to Show Cause for Certificate of Reasonable Doubt.
11. Affidavit of Robert S. Friedman, Read in Support of Motion for a Certificate of Reasonable Doubt.
12. Certificate of Reasonable Doubt.
13. Opinions Rendered by the Court of Appeals of the State of New York on appeal to that Court.

III. The following questions are presented by this Appeal:

1) Is Section 180 (a) of the Code of Criminal Procedure of the State of New York, which provides for the stopping, questioning and searching of persons in public places, repugnant to and in violation of the Fourth and Fourteenth Amendments to the Constitution of the United States?

The Court of Appeals of the State of New York decided in favor of the validity of such statute.

Section 180 (a) of the Code of Criminal Procedure of the State of New York, reads as follows:

- [fol. 71] 1. A Police officer may stop any person abroad in a public place whom he reasonably suspects is committing, has committed, or is about to commit a felony or any of the crimes specified in section five hundred fifty-two of this chapter, and may demand of him his name, address and an explanation of his actions.

2. When a police officer has stopped a person for questioning pursuant to this section and reasonably suspects that he is in danger of life or limb, he may search such person for a dangerous weapon. If the police officer finds such a weapon or any other thing the possession of which may constitute a crime, he may take and keep it until the completion of the questioning, at which time he shall either return it, if lawfully possessed, or arrest such person.

2) Is said Section 180 (a) of the Code of Criminal Procedure of the State of New York, because it permits the arrest of persons upon suspicion rather than and in the absence of probable cause, repugnant to, and in violation of the Fourth and Fourteenth Amendments to the Constitution of the United States?

3) Is said Section 180 (a) of the Code of Criminal Procedure of the State of New York, because it permits the search of persons upon suspicion rather than and in the absence of probable cause, repugnant to, and in violation of the Fourth and Fourteenth Amendments to the Constitution of the United States?

4) Is said Section 180 (a) of the Code of Criminal Procedure of the State of New York, as applied to to the Appellant in permitting the stopping, questioning and searching of the Appellant, repugnant to, and in violation of the Fourth and Fourteenth Amendments of the Constitution of the United States, and did the search of Appellant's [fol. 72] person constitute an unreasonable search and seizure in violation of the Fourth Amendment to the Constitution of the United States?

5) In view of the fact that the search of the Appellant and the seizure of evidence from his person was not authorized by a lawfully issued search warrant, or conducted pursuant to his consent, or as

an incident to a lawful arrest, was the search of Appellant's person and the seizure of evidence therefrom an unreasonable search and seizure in violation of the Fourth Amendment to the Constitution of the United States?

/s/ Robert S. Friedman,
Attorney for John Francis
Peters, Appellant

Office and Post Office Address
172 South Broadway, Suite 209
White Plains, New York. 10605

Dated: September 7th, 1966
White Plains, New York.

[fol. 73]

[Acknowledgment of Service
(omitted in printing)]

[fol. 73 A]

Filed Oct. 4, 1966, Edward L. Warren, County Clerk

Service of a copy of the within

is ~~hereby~~ admitted.

Dated, 9-7-66

/s/ Edward L. Warren
Clerk

[fol. 74]

SUPREME COURT OF THE UNITED STATES

No. 846 Misc., October Term, 1966

JOHN FRANCIS PETERS, APPELLANT

v.

NEW YORK

ORDER GRANTING MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS—March 27, 1967ON CONSIDERATION of the motion for leave to
proceed herein in forma pauperis,IT IS ORDERED by this Court that the said motion
be, and the same is hereby, granted.

[fol. 75]

SUPREME COURT OF THE UNITED STATES

No. 846 Misc., October Term, 1966

JOHN FRANCIS PETERS, APPELLANT

v.

NEW YORK

APPEAL from the Court of Appeals of the State of
New York.

ORDER NOTING PROBABLE JURISDICTION—March 27, 1967

The statement of jurisdiction in this case having been
submitted and considered by the Court, probable juris-
diction is noted. The case is transferred to the appellate
Docket as No. 1192, case placed on the summary calendar,
and set for oral argument immediately following No.
1139.



IN THE

NOV 17 1966

Supreme Court of the United States DAVIS, CLERK

OCTOBER TERM, 1966

No.

1

74

JOHN FRANCIS PETERS,

Appellant,

—v.—

STATE OF NEW YORK,

Appellee.

No.

63

NELSON SIBRON,

Appellant,

—v.—

STATE OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

**BRIEF OF NEW YORK CIVIL LIBERTIES UNION
AMICUS CURIAE**

NANETTE DEMBITZ

ALAN H. LEVINE

156 Fifth Ave.

New York, N. Y.

LEWIS A. STERN

120 Broadway

New York, New York

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1966

No. 846, Misc.

JOHN FRANCIS PETERS,

Appellant,

—v.—

STATE OF NEW YORK,

Appellee.

No. 821, Misc.

NELSON SIBRON,

Appellant,

—v.—

STATE OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

**BRIEF OF NEW YORK CIVIL LIBERTIES UNION
AMICUS CURIAE**

Interest of *Amicus Curiae*

The New York Civil Liberties Union, which files this brief with the consent of the parties, believes that the two cases at bar raise substantial federal questions under the Fourth and Fourteenth Amendments which should be heard and decided by this Court. The central question raised in each case is whether a police officer may search a suspicious looking person incident to an investigatory questioning of such person where the officer has neither a search warrant nor probable cause lawfully to arrest such person for any crime. In each of these cases, the New York Court of Appeals held that Section 180-a of the N. Y. Code of Criminal Procedure was constitutional and authorized the searches which occurred (18 N. Y. 2d 238, 244). The Court of Appeals further held (18 N. Y. 2d 242), that the searches and seizures involved in these cases were constitutional without regard to Section 180-a of the N. Y. Code of Criminal Procedure, upon the authority of its earlier decision in *People v. Rivera*, 14 N. Y. 2d 441 (1964), cert. den. 379 U. S. 978 (1965).

For the reasons set forth in this brief, we believe this Court should note jurisdiction so that this central question be fully briefed, argued and decided.

The Federal Questions Are Substantial

1. The federal questions raised in this appeal are of great public importance and concern. The New York statute and court decisions at issue on this appeal are merely examples—although extreme ones—of a growing trend of state statutes and state court decisions authorizing police

to stop, question, and "frisk" or search "suspicious persons" without probable cause to believe that the suspect has committed a crime. Section 180-a of the N. Y. Code of Criminal Procedure is modeled upon the Uniform Arrest Act promulgated more than twenty years ago by the Interstate Commission on Crime. See Warner, "The Uniform Arrest Act", 28 U. Va. L. Rev. 315 (1942). Statutes modeled on the Uniform Arrest Act have been enacted in New Hampshire, Rhode Island, and Delaware. N. H. Laws, §§594:2-3 (1955); R. I. Gen. Laws Ann. §12-7-1 (1965); Del. Code Ann. Tit. 11, §1902 (1953). Similar legislation has also been enacted in Hawaii, Massachusetts and the City of Miami, Florida. Rev. Laws of Hawaii, Tit. 30, ch. 255, §§4-5 (1955); Mass. Gen. Laws ch. 41, §98 (1961); Code of City of Miami, Florida, §43-46 (1957), as amended by Ord. No. 7,367 (1965).

The courts of at least two other states have authorized police to stop and frisk persons on mere suspicion and without probable cause to make an arrest. *People v. Mickelson*, 59 Cal. 2d 448, 450-51 (1963) (citing other California cases); *State v. Terry*, 5 Ohio App. 2d 122, 214 N. E. 2d 114, 34 Law Week 2458 (Ct. App., Cuyahoga Co. 1966).

The Model Code of Pre-Arraignment Procedure, currently under study by the American Law Institute, contains a "stop and frisk" section similar to N. Y. Code of Criminal Procedure §180-a. (See report of this year's annual meeting of the Institute, 34 Law Week 2641 (5/24/66).) And within the past year similar stop and frisk statutes were considered, although not adopted, by the states of Illinois (H. B. 1078) and Michigan (S. B. 747).

2. The New York statute and case law presented for review on this appeal constitute the most extreme inroads

made by state courts or legislatures to date upon Fourth and Fourteenth Amendment rights. Both Section 180-a and the pre-statutory case law in New York authorize police to stop, question, and "frisk" or search a suspect whenever the policeman "reasonably suspects" that the suspect has committed, is committing, or is *about to commit* a crime. Although in at least one other state similar statutory language has been construed to constitute the equivalent of the recognized constitutional standard of probable cause to make an arrest, *De Salvatore v. State*, 52 Del. 550, 163 A. 2d 244, 249 (1960), the New York Court of Appeals in the instant case and in earlier cases has clearly stated that the "reasonable suspicion" required for a stop-and-frisk in New York is a lesser standard than probable cause:

"And the evidence needed to make the inquiry is not of the same degree or conclusiveness as that required for an arrest. The stopping of the individual to inquire is not an arrest and the ground upon which the police may make the inquiry may be less incriminating than the ground for an arrest for a crime known to have been committed." *People v. Peters*, 18 N. Y. 2d at 242 quoting from *People v. Rivera*, 14 N. Y. 2d at 445.

Moreover, the New York Court of Appeals has clearly defined its standard of "reasonable suspicion" in the broadest possible terms as constituting the mere *intuition* of the experienced police officer:

"By requiring the reasonable suspicion of a police officer, the statute incorporates *the experienced police officer's intuitive knowledge and appraisal* of criminal activity. His evaluation of the various factors involved insures a protective, as well as definitive, standard" 18 N. Y. 2d at 245. (Emphasis added.)

See also the similar definition adopted by the County Court of Westchester County in the *Peters* case, 254 N. Y. Supp. 2d 10, 12 (1964).

Indeed, the opinions of both the Court of Appeals and the County Court in *Peters* strongly imply that a person is protected from detention and search under §180-a only where his activities are "perfectly normal" 18 N. Y. 2d 246; see also 254 N. Y. Supp. 2d at 13.

In short, Judge Van Voorhis accurately defined the scope of §180-a and the New York case law in his dissent in *People v. Sibron*, below, as follows:

"The power to frisk is practically unlimited, inasmuch as whether an officer 'reasonably suspects' that someone is committing, has committed or is about to commit a felony necessarily depends to a large extent upon the subjective operations of the mind of the officer" 18 N. Y. 2d 605.

3. The authorization to police to search a suspect on "reasonable suspicion" or their own intuition is in sharp conflict with the Fourth Amendment's protection against unreasonable searches and seizures as heretofore defined by this Court. This Court has repeatedly held that any search of the person of an accused without a warrant is constitutional only if made incident to a lawful arrest based upon probable cause to believe that the accused has committed a crime. See, e.g., *Aguilar v. Texas*, 378 U. S. 108, 112 n.3, 122 (1964); *Ker v. California*, 374 U. S. 23, 34-35, 53 (1963); *Rios v. United States*, 364 U. S. 253, 261-62 (1960). This Court unequivocally rejected any form of "suspicion" as a standard to authorize any search in *Henry v. United States*, 361 U. S. 98, 101-102 (1959):

"As the early American decisions both before and immediately after its [the Fourth Amendment's] adoption show, common rumor or report, *suspicion*, or even '*strong reason to suspect*' was not adequate to support a warrant for arrest. And that principle has survived to this day. . . . It was against this background that scholars recently wrote, 'Arrest on mere suspicion collides violently with the basic human right of liberty.' . . . While a search without a warrant is, within limits, permissible if incident to a lawful arrest, if an arrest without a warrant is to support an incidental search, *it must be made with probable cause.*" (Emphasis added.)

4. The Court of Appeals below attempted to justify its authorization of "frisks" upon less than probable cause on the grounds that a frisk—which it defined as "the patting of the exterior of one's clothing in order to detect by touch the presence of a concealed weapon" (18 N. Y. 2d 245)—is a "lesser degree" invasion of privacy than a "full blown search of the person" (18 N. Y. 2d 245). However, the Court of Appeals has most definitely not limited either §180-a or its own decisional authorizations of stops-and-frisks to a mere "frisk" as defined above. In *People v. Peters*, officer Lasky's frisk of appellant was completed when he felt a hard object in appellant's pocket and withdrew an opaque envelope from the pocket. Lasky then went further, however, and searched the envelope. Similarly, in *People v. Sibron*, below, the Court of Appeals held valid a so-called frisk where "the officer put his hand into the suspect's pocket", 18 N. Y. 2d 604; and in *People v. Pugach*, 15 N. Y. 2d 65 (1965), cert. den. 380 U. S. 936 (1965), the Court of Appeals further held that police officers, as part of a so-called frisk, might search a suspect's briefcase.

In any event, the prior decisions of this Court under the Fourth Amendment clearly preclude any constitutional distinction between a "frisk" and a "full blown search". The governing principle that any such invasion of privacy is subject to constitutional protection was clearly held by this Court in *Mapp v. Ohio*, 367 U. S. 643, 646-47 (1961), where this Court reaffirmed the following doctrine announced in *Boyd v. United States*, 116 U. S. 616 (1886) and *Entick v. Carrington*, 19 How. St. Tr. 1030 (1765):

"The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offense,—it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of that judgment" 116 U. S. 630.

It is obvious that a frisk is an invasion into the "privacies of life", "personal security", and "personal liberty" of its.

subject, and that, under the *Mapp*, *Boyd*, and *Entick* decisions, it is this invasion "that constitutes the essence of the offense" while any distinctions of degree which may exist between a frisk and a "full blown search" are merely differences as to the "circumstances of aggravation".

In accord with the foregoing, numerous courts have held that a frisk of an accused for weapons is, for constitutional purposes, indistinguishable from a "full blown search" of the accused's person. *White v. United States*, 271 F. 2d 829 (D. C. Cir. 1959); *State v. Collins*, 150 Conn. 488, 491-92 (1963); *Ellis v. United States*, 264 F. 2d 372, 374 (D. C. Cir. 1959), *cert. den.* 359 U. S. 998 (1959); *People v. Esposito*, 118 Misc. 867, 871-72, 194 N. Y. S. 326, 331-32 (Ct. Spec. Sess., 1922).

5. The supposed need for a policeman to frisk or search suspicious persons for the policeman's self-protection cannot justify the invasion of Fourth Amendment rights countenanced by the New York statute and case law brought for review upon the present appeals.

This Court has never heretofore permitted any relaxation of the constitutional requirements for searches and seizure on the grounds of self-defense of the police officer. Any such exception on grounds of expediency would seem markedly inconsistent with this Court's many holdings that fundamental Fourth and Fifth Amendment rights may not be violated in the supposed interests of better law enforcement or greater public safety. E.g. *Miranda v. Arizona*, 384 U. S. 436, 479-82 (1966); *Mapp v. Ohio*, 367 U. S. 643, 659-60 (1961). As Judge Fuld stated in his dissenting opinion below in the instant case:

"Of course, there are risks inherent in investigatory activities undertaken by the police but, certainly, it does not follow from that that the police are privileged, absent probable cause, to search anyone who looks or acts suspiciously and to use against him any articles they may find on his person. As I previously observed, 'Other methods are available whereby the police may protect themselves while carrying on their investigations, other procedures which, if utilized, will safeguard the police and the community from the criminal minority without destroying the sense of dignity and freedom with which the law-abiding majority walk the streets.' (*People v. Rivera*, 14 N. Y. 2d 441, 452 [dissenting opinion], cert. den. 379 U. S. 978.)" 18 N. Y. 2d at 248.

Similar doubts as to the law enforcement justification for stop and frisk legislation have been expressed by a justice of the Supreme Court of Michigan. Souris, *Stop and Frisk or Arrest and Search—The Use and Misuse of Euphemisms*, J. CRIM. L., C. & P. S. (1966).

Moreover, should this Court conclude that self-defense of the police officer may, under appropriate circumstances, itself constitute constitutional grounds for the officer to search a suspicious person, some definition of the circumstances under which such a self-defense search can be made is unquestionably needed. Although the New York Court of Appeals has rationalized the searches authorized by Section 180-a and by its own prior decisions on the basis of the self-defense needs of the police officer, the Court of Appeals has not limited either Section 180-a or its own pre-statutory decisions to circumstances where a frisk is genuinely necessary for the protection of the policeman.

In the *Peters* case, there is not one shred of evidence that officer Lasky reasonably—or even unreasonably—believed he was in any danger as he held Peters by the collar and questioned him at gun-point. Moreover, any danger that may have existed in that situation was removed at the moment when officer Lasky removed the opaque envelope from appellant's hip pocket. There existed no further possible danger to officer Lasky to justify his opening the envelope and examining its contents. Similarly, in *People v. Pugach*, 15 N. Y. 2d 65 (1965) where the police searched the defendant's briefcase before taking the defendant to the police station for questioning, any possible danger to the police from a weapon in the briefcase could have been eliminated by the simple expedient of keeping the briefcase away from the defendant in the front seat of the police car, and no search of the briefcase was necessary. See 15 N. Y. 2d at 71 (Fuld, J., dissenting). As Judge Van Voorhis noted in his dissent in *People v. Sibron* in the court below, the authorization to search granted to the police in New York under Section 180-a and related court decisions has been defined so broadly that "the safety of the officer or public from violence is not remotely involved" 18 N. Y. 2d 607.

6. Finally, the search of appellant's person without probable cause cannot be upheld, as the Court of Appeals seemed to do below (18 N. Y. 2d at 244; see also *People v. Rivera, supra*, 14 N. Y. 2d at 444-46), on the ground that appellant was merely under investigative "detention" and not under arrest at the time the search occurred.

It might parenthetically be noted that the authority granted a police officer under subsection 1 of 180-a to "stop" a person on reasonable suspicion and "demand of him his name, address, and an explanation of his actions" raises

separate and substantial questions under this Court's recent decision in *Miranda v. Arizona*, 384 U. S. 436 (1966). See also Reich, *Police Questioning of Law Abiding Citizens*, 75 YALE L.J. 1161 (1966).

However, whether appellant's custody is called an "arrest" or a mere "investigatory detention" is irrelevant in determining the constitutionality of the search of his person without probable cause. The Fourth Amendment, as heretofore construed by this Court, does not merely prohibit searches incident to unlawful arrests; heretofore any search without a warrant, based upon probable cause, has been considered lawful only if made incident to a lawful arrest made upon probable cause. E.g. *Aguilar v. Texas*, 378 U. S. 108, 112 n.3, 122 (1964); *Ker v. California*, 374 U. S. 23, 34-35, 53 (1963); *Rios v. United States*, 364 U. S. 253, 261-62 (1960). There is no authority whatever justifying any search on the basis of its being reasonably incident to an "investigatory detention" made on less than probable cause.

In any event, in the *Peters* case appellant was not merely stopped politely for investigational purposes. On the contrary, officer Lasky "collared" appellant at gun-point. This constituted an assault or, at the very least, an arrest of appellant which was unlawful since it was not based upon probable cause. The undisputed facts of *Peters* are strikingly similar to the disputed testimony of the taxidriver in *United States v. Rios*, 364 U. S. 253, 257-258 (1960) which this Court held would, if believed by the trier of the facts, constitute an unlawful arrest. 364 U. S. at 261-62. See also other definitions of arrest in *Henry v. United States*, 361 U. S. 98, 103 (1959); *United States v. Scott*, 149 F. Supp. 837, 840 (D. D. C. 1957); *United States v. Viale*, 312 F. 2d 595, 601 (2d Cir. 1963).

CONCLUSION

Section 180-a of the N. Y. Code of Criminal Procedure and the rulings of the New York Court of Appeals below empower police to conduct searches and seizures under circumstances not heretofore tolerated by this Court. The decision whether these searches and seizures violate the Fourth and Fourteenth Amendments to the United States Constitution requires full briefing and oral argument before this Court:

Accordingly, it is urged that jurisdiction be noted.

Respectfully submitted,

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SUPREME COURT, U.S.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 74

JOHN FRANCIS PETERS,

Appellant,

v.

STATE OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE
STATE OF NEW YORK

BRIEF FOR THE APPELLANT

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BRIEF FOR THE APPELLANT

Opinion Below

The opinion of the Court of Appeals of the State of New York (R. 46-56) is reported at 18 N.Y. 2d 238, 273 N.Y. Supp. 2d 217 (1966).

Jurisdiction

The judgment of the Court of Appeals of the State of New York, was entered on the 7th day of July, 1966 (R. 57-58). A timely Notice of Appeal was served and a

Statement of Jurisdiction was filed on the 10th day of October, 1966. An Order Noting Probable Jurisdiction was entered on the 27th day of March, 1966 (R. 63). The jurisdiction of this Court rests upon Title 28 U.S.C. Section 1257(2), the Court of Appeals of the State of New York having rejected appellant's timely claim that Section 180-a of the Code of Criminal Procedure of the State of New York is invalid on the ground of its being repugnant to the Fourth and Fourteenth Amendments of the Constitution of the United States.

Questions Presented

The following questions are presented by this appeal:

1. Is Section 180-a of the Code of Criminal Procedure of the State of New York, which provides for the stopping, questioning and searching of persons in public places, repugnant to and in violation of the Fourth and Fourteenth Amendments of the Constitution of the United States:

(a) Is Section 180-a of the Code of Criminal Procedure of the State of New York, because it permits the search of persons upon suspicion rather than and in the absence of probable cause, repugnant to and in violation of the Fourth and Fourteenth Amendments of the Constitution of the United States of America?

(b) Is Section 180-a of the Code of Criminal Procedure of the State of New York, because it permits the arrest of persons upon suspicion rather than and in the absence of probable cause, repugnant to and in violation of the Fourth and Fourteenth Amendments of the Constitution of the United States?

(c) Is Section 180-a of the Code of Criminal Procedure of the State of New York as applied to the appellant, in permitting the stopping, questioning and searching of the appellant, repugnant to and in violation of the Fourth and Fourteenth Amendments of the Constitution of the United States?

2. In view of the fact that the search of the appellant and the seizure of evidence from his person was not authorized by a lawfully issued search warrant or conducted pursuant to his consent, or as an incident to a lawful arrest, was the search of the appellant's person and the seizure of evidence therefrom an unreasonable search and seizure in violation of the Fourth Amendment of the Constitution of the United States?

Statutory and Constitutional Provisions Involved

1. The statute, the validity of which has been drawn in question, is Section 180-a of the Code of Criminal Procedure of the State of New York, as added by the laws of 1964, Chapter 86, Section 2, effective July 1, 1964. (McKinney's Consolidated Laws of New York, Annotated.) Said statute is as follows:

"Sec. 180-a. Temporary questioning of persons in public places; search for weapons.

1. A police officer may stop any person abroad in a public place whom he reasonably suspects is committing, has committed, or is about to commit a felony or any of the crimes specified in section five hundred fifty-two of this chapter, and may demand of him his name, address and an explanation of his actions.

2. When a police officer has stopped a person for questioning pursuant to this section and reasonably suspects that he is in danger of life or limb, he may search such person for a dangerous weapon. If the police officer finds such a weapon or any other thing the possession of which may constitute a crime, he may take and keep it until the completion of the questioning, at which time he shall either return it, if lawfully possessed, or arrest such person."

2. The constitutional provisions to which, in appellant's view, the foregoing statutory provisions are repugnant to and in violation of, are as follows:

"U. S. Const., Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U. S. Const., Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement

The appellant was arrested on the 10th day of July, 1964, by police officers attached to the Police Department of the City of Mount Vernon, County of Westchester, State of New York. He was charged by said police officers with having violated Section 408 of the Penal Law of the State of New York, the gravamen of said charge being the illegal possession of burglar's tools (R. 13-14). On the 28th day of July, 1964, the appellant appeared before the Court of Special Sessions of the City of Mount Vernon, where a preliminary hearing was had with respect to the charges made against him (R. 13-25).

The stenographic minutes of the preliminary hearing reveal that the People presented two (2) witnesses in support of their case. The People's first witness was one Samuel L. Lasky, a police officer attached to the Police Department of the City of New York (R. 14-22). Officer Lasky testified, in substance, that he resided in a sixth (6th) floor apartment at #465 E. Lincoln Avenue, Mount Vernon, New York, and that those premises consisted of a multiple dwelling, housing approximately one hundred twenty (120) families (R. 14).

It was the testimony of Officer Lasky that on the 10th day of July, 1964, at or about 1:00 p.m. on that day, he observed, through the "peephole" of his apartment door, two (2) men tiptoeing towards the sixth (6th) floor stairway of his apartment building. He further testified that he left his apartment, taking with him his revolver, and ran after the two (2) men, and that he apprehended the appellant between the fourth (4th) and fifth (5th) floors of the aforementioned premises, while the appellant was descending the stairway (R. 15-16).

While Officer Lasky pointed his revolver at the appellant, and while he had the appellant by the shirt collar, he asked the appellant why he was in the premises. The appellant told the police officer, in substance, that he was in the premises in order to visit a girlfriend. Upon being asked by the police officer for the name of the "girlfriend", the appellant refused to divulge the same, stating that the woman in question was a married woman (R. 16, 20, 21).

Officer Lasky further testified on direct examination that he searched the appellant's person and removed therefrom an opaque plastic envelope, which he later opened and which allegedly contained certain tools or instruments adaptable to the commission of burglary (R. 16-18).

On cross examination, Officer Lasky testified that when he "frisked" appellant, he felt something "hard", which did not seem like a gun, which may have felt like a knife, but that he was unable to feel either the length or the width of the object (R. 21-22).

At the conclusion of the hearing, the appellant was held for the further action of the Grand Jury of Westchester County (R. 24-25).

After indictment, the appellant moved for the suppression of certain evidence seized from his person, and for an order permitting him to inspect the Grand Jury minutes herein, or in the alternative, for an order dismissing the indictment (R. 3, 4).

Upon the motion made by the appellant for the suppression of evidence seized from his person, the appellant contended that the search of his person and the seizure of evidence therefrom constituted an illegal search and seizure.

in contravention and violation of the provisions of the Fourth and Fourteenth Amendments of the Constitution of the United States of America.

The Court, in denying appellant's motion, sustained the validity of the subject search and seizure upon the authority of Section 180-a of the Code of Criminal Procedure of the State of New York, added by the laws of 1964, Chapter 86, Section 2, effective July 1, 1964. The Court relied upon Section 180-a of the Code of Criminal Procedure of the State of New York despite the fact that the People of the State of New York, in opposing appellant's motion, clearly stated that they did not rely upon said statute (R. 36-41).

Subsequently, and on or about the 30th day of October, 1964, the appellant's motions for the suppression of evidence and the dismissal of the indictment were denied, without a hearing (R. 36-41).

Thereafter, the appellant, having no triable issue of fact, entered a plea of guilty with respect to a violation of Section 408 of the Penal Law of the State of New York as a misdemeanor, while specifically reserving his right of appeal as provided for under Section 813-c of the Code of Criminal Procedure of the State of New York.

On the 5th day of January, 1965, the appellant filed a Notice of Appeal to the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, and simultaneously therewith, he applied to the County Court of the County of Westchester, State of New York, for a Certificate of Reasonable Doubt, urging among other things, that

(a) Section 180-a of the Code of Criminal Procedure of the State of New York, was on its face, and as applied

to appellant, contrary to and in violation of the express provisions of the Fourth and Fourteenth Amendments of the Constitution of the United States of America.

(b) That Section 180-a of the Code of Criminal Procedure of the State of New York violated the Fourteenth Amendment of the Constitution of the United States of America in that it permitted police officers on the basis of vague, arbitrary and capricious standards to conduct unreasonable searches and to restrain persons of their liberty all without the due process of law.

(c) The appellant contended that the search of his person and the seizure of evidence therefrom was not authorized by a lawfully issued search warrant or conducted pursuant to his consent, or as an incident to a lawful arrest and that therefore, said search and seizure constituted an unreasonable search and seizure in violation of the Fourth Amendment of the Constitution of the United States of America.

Thereafter, and on the 13th day of January, 1965, a Certificate of Reasonable Doubt as to the defendant's conviction was granted by the County Court of the County of Westchester, State of New York (R. 43).

Appellant, restating his federal claims, appealed the judgment of conviction to the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department. On the 6th day of December, 1965, the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, affirmed the judgment of conviction without opinion (R. 45).

Thereafter, the appellant, having first obtained the permission of a judge of the Court of Appeals of the State of

New York, appealed to that Court again repeating his federal claims. On the 7th day of July, 1966, a divided court affirmed the judgment of conviction, 18 N.Y. 2d 238 (1966) (R. 46-58).

Summary of Argument

Section 180-a of the Code of Criminal Procedure of the State of New York authorizes the stopping, questioning and searching of persons in public places without their consent, in the absence of a lawfully issued search warrant, and without the existence of probable cause for believing that the person has committed or is about to commit a crime.

The Court below, in construing the statute, conceded that the statutory standard of "reasonable suspicion" was a lower standard than the Fourth Amendment requirement of *probable cause* (R. 50). It defined the statutory standard of "reasonable suspicion" in vague and amorphous terms which merely call for the exercise of a police officer's intuition, and which fail to provide any objective standard (R. 51). The majority below sought to justify the elimination of the Fourth Amendment standard of probable cause by denominating the search in the instant case a *frisk* and by referring to the arrest of the appellant as a *detention* rather than an arrest. Appellant contends that his arrest and the search and seizure of his person were unlawful and unreasonable, and that semantics cannot be employed to avoid the requirements of the Fourth Amendment. It is the intrinsic nature of the conduct itself, rather than the label, which determines the rule of law to be applied.

Section 180-a of the Code of Criminal Procedure of the State of New York, by eliminating the requirement of *prob-*

able cause and by permitting a prior restraint upon personal liberty before the commission of, and in the absence of any overt criminal act, contravenes both the Fourth and Fourteenth Amendments of the United States Constitution.

The Court below erred in sustaining; independently of Section 180-a of the Code of Criminal Procedure, the search of appellant and the seizure of evidence from his person. A search and seizure cannot be justified or made *reasonable*, in the absence of probable cause, by the mere assertion that the search was a necessary self-protective police measure (R. 48-49). Moreover, the search of appellant was conducted as an incident to an *unlawful arrest and assault* committed upon him by the police officer, and as such it far exceeded the bounds authorized by the decision of the New York Court of Appeals in the *Rivera* case as well as the statutory authority set forth in Section 180-a of the Code of Criminal Procedure of the State of New York.¹ No power exists in the Legislature of the State of New York, or in the courts of that state, to diminish, suspend or revoke the rights guaranteed to the people under the Fourth and Fourteenth Amendments of the Constitution.

¹ *People v. Rivera*, 14 N.Y. 2d 441, 252 N.Y. Supp. 2d 458 (1964).

ARGUMENT

I.

A State May Not by Legislative Fiat Authorize the Stopping, Questioning, and Searching of Persons in Public Places Without Their Consent, in the Absence of a Lawfully Issued Search Warrant, and Without the Existence of Probable Cause for Believing That the Person Has Committed or Is About to Commit a Crime.

(a)

The Fourth Amendment requirement of "probable cause"

Although the *reasonableness* or *unreasonableness* of a search and seizure must be decided upon the facts of a given case, the Fourth Amendment of the Constitution of the United States provides a standard for the determination of whether or not a search is constitutionally permissible. The reasonableness of every search, whether made pursuant to a lawfully issued search warrant or conducted in the absence of a search warrant, must be judged in the light of the constitutional requirement that it be predicated upon *probable cause*. The Fourth Amendment provides a basic definition of what constitutes a *reasonable search*, i.e., a search made pursuant to a warrant issued upon *probable cause*.²

This Court has, from time to time, enunciated the standard to be applied in determining the reasonableness of a search, not authorized by consent or by a search warrant,

² U. S. Const., Amend. IV.

and has left no doubt that such a search is deemed reasonable only if conducted as incident to a lawful arrest, based upon *probable cause* for believing that the defendant has committed or is committing a crime.³ Although the question as to what constitutes probable cause has been before the Court on many occasions, it is clear that, in the constitutional sense, a reasonable search must always be predicated upon the existence of probable cause whether conducted with or without a warrant.⁴

³ The instant case raises the question as to whether or not the State of New York can, by legislative enactment, dispense with the Fourth Amendment requirement that a reasonable search be predicated upon probable cause. Appellant contends that no power exists in the Legislature of the State of New York or in the courts of that state to diminish, suspend or revoke the rights guaranteed to the people under the Fourth Amendment.

Section 180-a of the Code of Criminal Procedure of the State of New York authorizes a police officer to search a suspect whenever the police officer "reasonably suspects" that the person has committed or is about to commit any one of certain specified crimes and when the police officer "reasonably suspects that he is in danger of life or limb".

The statute must be construed in the light of the opinion of the Court below and in upholding the validity of Section 180-a of the Code of Criminal Procedure, the Court of Appeals stated:⁵

³ *Henry v. United States*, 361 U.S. 98, 101 et seq. (1959); *United States v. Rios*, 364 U.S. 253, 261-262 (1960); *United States v. Rabinowitz*, 339 U.S. 56, 62-63 (1950).

⁴ *Wong Sun v. United States*, 371 U.S. 471, 478 (1963).

⁵ *Winters v. New York*, 333 U.S. 507, 514 (1948).

"... in the last analysis the constitutionality of the statute is determined not so much by the language employed as by the conduct it authorizes" (R. 50).

It is precisely in this area, i.e., the conduct authorized by Section 180-a of the Code of Criminal Procedure—that appellant contends that the statute is repugnant to the express provisions of the Fourth and Fourteenth Amendments of the Constitution of the United States.

Concededly, the statutory standard of "reasonable suspicion" refers to a standard requiring less than probable cause for believing that the person to be stopped and searched has committed or is about to commit a crime.⁶ A reading of the majority opinion below leaves no doubt that the New York State Court of Appeals has construed Section 180-a of the Code of Criminal Procedure of the State of New York so as to authorize a *detention* and a *search* on less than probable cause. The Court below defined the statutory standard of "reasonable suspicion" as consisting of the *intuitive knowledge* of the experienced police officer.⁷ With all due respect for the opinion of the Court below, appellant submits that an experienced police officer's "intuitive knowledge and appraisal" calls for no

⁶ The Court stated, "The phrase 'reasonable suspicion' provides a defined standard and is, in fact, no less endowed with an objective meaning than is the phrase 'probable cause'. Courts will have no difficulty in applying this standard and have frequently in the past referred to 'suspicion' or 'reasonable suspicion' as terms with a definite meaning, somewhat below probable cause on the scale of absolute knowledge of criminal activity" (R. 50).

⁷ "By requiring the reasonable suspicion of a police officer, the statute incorporates the experienced police officer's intuitive knowledge and appraisal of the appearances of criminal activity. His evaluation of the various factors involved insures a protective, as well as definitive, standard" (R. 51).

more than a visceral reaction on the police officer's part, and fails to provide any definitive objective standard. As Judge Van Voorhis stated below, in the companion case of *People v. Sibron*, 18 N.Y. 2d 603, 605, 272 N.Y. Supp. 2d 374, 376 (1966):

"The power to frisk is practically unlimited, inasmuch as whether an officer 'reasonably suspects' that someone is committing, has committed or is about to commit a felony necessarily depends to a large extent upon the subjective operations of the mind of the officer."

Appellant respectfully contends that the statutory authority to conduct a search based upon the vague and amorphous standard of "reasonable suspicion", which simply stated consists of no more than a police officer's intuition, is repugnant to and in direct conflict with the Fourth Amendment prohibition against unreasonable searches and seizures.*

(b)

Arrest v. Detention

The majority below sought to justify the elimination of the Fourth Amendment requirement of probable cause by denominating the stopping of appellant as a *detention* rather than an *arrest*. The Court below, in upholding the validity of Section 180-a of the Code of Criminal Procedure stated,

* *Henry v. United States*, 361 U.S. 98, 101 et seq. (1959); *United States v. Rios*, 364 U.S. 253, 261-262 (1960); *United States v. Rabinowitz*, 339 U.S. 56, 62-63 (1950).

"The statute makes it clear that the Legislature did not intend the stopping . . . to be an arrest."⁹

With all due respect for the opinion of the majority below, appellant submits that the statute does not make clear any such legislative intent as imported to it by the Court below.

Section 180-a of the Code of Criminal Procedure of the State of New York is contained within Chapter IV of the Code. That chapter is entitled, "Arrest by an Officer Without a Warrant". There can be no doubt that the activity authorized by Section 180-a of the Code of Criminal Procedure falls within the ambit of police activity known as an arrest. That this is the case is demonstrated not only by the title of the statutory chapter in which Section 180-a is contained, but also by the intrinsic nature of the police officer's authorized activity. It is that activity, as the Court below stated, which must be the ultimate gauge of the constitutionality of the statute.

Section 171 of the Code of Criminal Procedure states,

"An arrest is made by an actual restraint of the person of the defendant, or by his submission to the custody of the officer."¹⁰

The weight of authority has held that as soon as dominion is exercised over the person an arrest takes place.¹¹

⁹ R. 50.

¹⁰ Code of Criminal Procedure, State of New York, Section 171. McKinney's Consolidated Laws of New York, Annotated.

¹¹ See Sobel, Hon. Nathan R., *Current Problems in the Law of Search and Seizure*, published under the auspices of the Kings County Criminal Bar Association, Gould Publications (1964).

Irrespective of the language employed, the opinion of the Court below must be read in the light of the facts presented by the record. With respect to the instant case, the question is posed, was an arrest of the appellant effectuated when Officer Lasky grabbed him by the shirt collar and pointed his drawn service revolver at him? No amount of semantic manipulation can avoid the obvious conclusion that the appellant was under arrest. It is respectfully submitted that any other conclusion defies the dictates of reason and common sense.

The question of the constitutionality of an arrest based upon "reasonable suspicion" instead of, and as opposed to, probable cause, still remains. In dealing precisely with this question, this Court has held,

"... as the early American decisions both before and immediately after its [the Fourth Amendment's] adoption show, common rumor or report, suspicion, or even 'strong reason to suspect' was not adequate to support a warrant for arrest. And that principle has survived to this day. . . . It was against this background that two scholars recently wrote, '*Arrest on mere suspicion collides violently with the basic human right of liberty.*'

... And while a search without a warrant is, within limits, permissible if incident to a lawful arrest, if an arrest without a warrant is to support an incidental search, *it must be made with probable cause.*"¹² (Emphasis supplied.)

Even if one were to assume, *arguendo*, that the level of restraint imposed on the appellant did not constitute an

¹² *Henry v. United States*, 361 U.S. 98, 101 et seq. (1959).

arrest, we are still left with the irrefutable proposition that "reasonable suspicion" is an inadequate constitutional standard for the authorization of a search and seizure. This Court in *United States v. Rabinowitz*, held that a search may be upheld if conducted as incident to a lawful arrest.¹³ That principle cannot be extended, as the Court of Appeals of New York apparently has assumed, to sustain a search as incident to a detention on less than probable cause.

(c)

Frisk v. Search

The Fourth Amendment requirement of *probable cause* cannot be circumvented by the semantic device of labeling a search a *frisk*. Although the language of Section 180-a of the Code of Criminal Procedure employs the term "search" and makes no reference to a so-called "frisk", the Court of Appeals of the State of New York has nonetheless sought to distinguish the conduct of the police officer in the instant case as a "frisk" rather than a search. The majority below restated its position as previously enunciated in *Peo. v. Rivera*, 14 N.Y. 2d 441, 446 (1964):

"In *Rivera*, we went to some length to distinguish a frisk from a full search: 'It is something of an invasion of privacy; but so is the stopping of the person on the street in the first place something of an invasion of privacy. The frisk is less such invasion in degree than an initial full search of the person would be. It ought to be distinguishable also on pragmatic

¹³ *United States v. Rabinowitz*, 339 U.S. 56, 62-63 (1950).

grounds from the degree of constitutional protection that would surround a full blown search of the person.”¹⁴

Stated alternatively, the Court of Appeals of the State of New York has sought to justify withholding the protection of the Fourth Amendment by distinguishing between a “limited search” and an extensive or “full blown search”. It is appellant’s respectful contention that the Fourth and Fourteenth Amendments of the Constitution of the United States do not permit any distinction to be made between a “limited” and a “full blown search”. Moreover, the New York Court of Appeals, although speaking in terms of limited searches, has by decision authorized, under the guise of the term “frisk”, searches which are unrestricted in every conventional sense of the word. In the companion case of *People v. Sibron*, the Court of Appeals held valid a so-called “frisk” where a police officer put his hand into a suspect’s pocket.¹⁵ An even further extension of the term “frisk” is found in *People v. Pugach*, 15 N.Y. 2d 65 (1965), *cert. den.*, 380 U.S. 936 (1965), where the Court permitted the search of a suspect’s briefcase as part of a so-called “frisk”. Paraphrasing a familiar quotation—a search by any other name is still a search.” Indeed, Webster’s New Collegiate Dictionary (6th ed.), at page 333, defines a “frisk” as follows:

“... To *search* (a person) by running the hand over the clothing, through the pockets, etc.; ...” (Emphasis supplied.)

¹⁴ R. 51.

¹⁵ *People v. Sibron*, 18 N.Y. 2d 603, 604.

Numerous courts have squarely held that a frisk of the accused for weapons is indistinguishable from a "full blown" search of the person.¹⁶

This Court in its decision in *Mapp*, noted that it is the individual's right to privacy which is embodied in the Fourth Amendment of the Constitution of the United States and which is made enforceable against the States by the Due Process Clause of the Fourth Amendment of the Constitution of the United States.¹⁷

Appellant respectfully submits that irrespective of the semantics employed, it is just as much a search, and an affront to the individual's right of privacy to run one's hands over a person's pockets as to place one's hands inside of them. The Court of Appeals of the State of New York while recognizing that such conduct constitutes an "invasion of privacy" has, by semantic gymnastics, withheld the protection of the Fourth Amendment of the United States Constitution from appellant.¹⁸ As construed by the majority below, Section 180-a of the Code of Criminal Procedure of the State of New York is on its face, and as applied to the facts of this case, clearly repugnant to the Fourth Amendment proscription against unreasonable searches and seizures.

¹⁶ *White v. United States*, 271 Fed. 2d 829 (D.C. Cir., 1959); *State v. Collins*, 150 Conn. 488, 491-492 (1963); *Ellis v. United States*, 264 Fed. 2d 372, 374 (D.C. Cir., 1959), *cert. denied*, 359 U.S. 948.

¹⁷ *Mapp v. Ohio*, 367 U.S. 643, 659 (1961).

¹⁸ R. 51.

II.

The Search and Seizure in the Instant Case Was Incident to an Unlawful Arrest and Constituted a Violation of Appellant's Rights Under the Fourth and Fourteenth Amendments.

The Court of Appeals of New York by its prior decision in *People v. Rivera*, 14 N.Y. 2d 441 (1964) authorized the frisking of an accused as a self-protective measure under circumstances construed by that Court to be less than those which would constitute an arrest. In the instant case, the New York Court of Appeals equated the action authorized by Section 180-a of the Code of Criminal Procedure with the action sanctioned by that Court in the *Rivera* case.¹⁹ As hereinabove set forth, it is appellant's contention that Section 180-a of the Code of Criminal Procedure of the State of New York is repugnant to and in violation of the Fourth and Fourteenth Amendments of the Constitution of the United States. Similarly, and upon the same grounds, appellant contends that the conduct sanctioned by the New York Court of Appeals in the *Rivera* case is unconstitutional.

The search and seizure in the instant case cannot be sustained even if one were to accept, *arguendo*, the position of the New York Court of Appeals with respect to the *Rivera* case and Section 180-a of the Code of Criminal Procedure.

The search or "frisk" of appellant was conducted as an incident to an *unlawful arrest* and *assault* committed upon him by the police officer, and as such it far exceeded the

¹⁹ R. 50.

bounds/ authorized by the decision of the New York Court of Appeals in the *Rivera* case, and the statutory authority set forth in Section 180-a of the Code of Criminal Procedure of the State of New York.

The record is abundantly clear that the police officer had observed nothing which could give rise to a *reasonable* suspicion that the appellant was a person who was committing, had committed, or was about to commit a felony, etc. The officer's testimony was to the effect that he observed the appellant, "tiptoeing" through the hallway of the premises (R. 15, 20). Counsel respectfully suggests that walking through a hallway of an apartment house dwelling in the middle of the afternoon, irrespective of the manner of one's gait, is scarcely a sufficient basis to give rise to a *reasonable* suspicion as to the commission or the imminence of the commission of a crime, as required by the statute.

Moreover, the record (R. 15, 16, 20, 21) clearly indicates that the defendant was not stopped for questioning as contemplated by either Section 180-a of the Code of Criminal Procedure of the State of New York, or by the decision of the New York Court of Appeals in the *Rivera* case.²⁰ On the contrary, prior to any questioning, the police officer in the instant case grabbed the appellant by the shirt collar while pointing his drawn revolver at appellant. Such con-

²⁰ Parenthetically, it may be noted that this Court's decision in *Miranda v. State of Arizona*, 384 U.S. 436 (1966) (decided June 13, 1966, approximately four weeks after the argument of the instant case before the New York Court of Appeals) raises substantial questions as to whether or not appellant was deprived of his constitutional right to remain silent, and as to whether or not the questioning authorized by Section 180-a of the Code of Criminal Procedure of the State of New York is repugnant to and in violation of the Fifth and Sixth Amendments of the Constitution of the United States.

duct on the part of the police officer, in the absence of probable cause for believing appellant had committed a crime or was about to commit a crime, constituted an assault—or at the very least—an *unlawful arrest*. This Court has clearly held that evidence seized as an incident to an unlawful arrest cannot be used against a defendant.²¹

²¹ *United States v. Rios*, 364 U.S. 253 (1960): In this case, an unresolved conflict existed in the testimony as to the circumstances surrounding the discovery of contraband in the defendant's possession. It was the testimony of the police officers that they approached the defendant while he was seated in a taxi cab which was stopped for a traffic light, and that upon one of the officers identifying himself as a policeman, the defendant dropped the package, which was recognized by the police officers as contraband, to the floor of the taxi. Thereupon, the police officers claimed that they opened the door of the taxi cab and arrested the defendant. However, the driver of the taxi cab testified that one of the police officers approached the taxi cab and with his drawn revolver "took hold of the defendant's arm while he was still in the cab" and before he dropped the package of narcotics (364 U.S. 257-258). This Court vacated and remanded the case in order that there might be a resolution of the conflicting testimony, it being unmistakably clear in the opinion of this Court that if the taxi cab driver's version of the facts were found to be the truth, then the contraband in question was unlawfully seized. This Court stated at 364 U.S. 261-62:

"The seizure can survive constitutional inhibition only upon a showing that the surrounding facts brought it within one of the exceptions to the rule that a search must rest upon a search warrant. . . . Here justification is primarily sought upon the claim that the search was an incident to a lawful arrest. Yet upon no possible view of the circumstances revealed in the testimony of the Los Angeles officers could it be said that there existed probable cause for an arrest at the time the officers decided to alight from their car and approached the taxi in which the petitioner was riding. . . . If, therefore, the arrest occurred when the officers took their positions at the door of the taxicab, then nothing that happened thereafter could make that arrest lawful, or justify a search as its incident."

There is a striking similarity in the disputed testimony in the *Rios* case to the undisputed facts which attended the search of the appellant in the instant case. The only difference being that instead

Additionally, it must be noted that the record in the instant case is absolutely barren of any testimony to indicate that the police officer reasonably (or unreasonably) suspected that his life or limb was endangered. The testimony clearly shows that the police officer had nothing to fear with respect to his personal safety. That he had the appellant under his control at all times and that he had not only seized the appellant by the shirt collar, but he additionally had the appellant subject to the authority of his pointed revolver (R. 15, 16, 20, 21).

of merely holding the defendant by the arm as occurred in *Rios*, the police officer in the instant case grabbed the appellant by the shirt collar.

See also:

United States v. Scott, 149 F. Supp. 837, 840 (D.D.C. 1957):

"The word 'arrest' has a well-defined meaning, the essence of which is a restriction of the right of locomotion or a restraint of the person."

United States v. Viale, 312 F. 2d 595, 601 (2d Cir. [1963]):

"When the officers interrupted the two men and restricted their liberty of movement, the arrest, for purposes of this case, was complete."

Henry v. United States, 361 U.S. 98, 103 (1959).

N. Y. Code of Crim. Proc. Sections 167, 171.

People v. Cassone, 35 Misc. 2d 699, 230 N.Y.S. 2d 822 (1962), *rev'd in part on other grounds*, 20 A.D. 2d 118, 245 N.Y.S. 2d 843, *aff'd* 14 N.Y. 2d 798, 251 N.Y.S. 2d 33, *cert. denied*, 379 U.S. 892 (approaching a suspect with drawn guns held to constitute an arrest).

Royne, "The Right to Investigate and New York's 'Stop and Frisk' Law," 33 Fordham L. Rev. 211, 237-38 (1964) (where police approach a suspect with drawn guns, "most courts would hold this to be an immediate arrest and would require probable cause for an arrest at the instant of approach").

50 Cornell L.Q. 529, 536 n. 58 and accompanying text (1965) (approaching a suspect with drawn guns constitutes an assault and is "more objectionable than a frisk").

Appellant submits that irrespective of the constitutionality of Section 180-a of the Code of Criminal Procedure of the State of New York and irrespective of the constitutionality of the conduct sanctioned by the New York Court of Appeals in *People v. Rivera, supra*, that the police officer's conduct in the instant case constituted an outrageous violation of the rights afforded appellant under the Fourth and Fourteenth Amendments of the Constitution of the United States.

Conclusion

In his dissent below, Judge Fuld characterized Section 180-a of the Code of Criminal Procedure of the State of New York as a "green light to abuse"; an "outright invitation to evade the constitutional prohibition against unreasonable searches"; and as a device to "circumvent" the exclusionary rule enunciated by this Court in *Mapp v. Ohio*.²²

This Court stated in *Mapp v. Ohio*:²³

"Having once recognized that the right to privacy embodied in the Fourth Amendment is enforceable against the States, and that the right to be secure against rude invasions of privacy by state officers is, therefore, constitutional in origin, we can no longer permit that right to remain an empty promise. Because it is enforceable in the same manner and to like effect as other basic rights secured by the Due Process

²² R. 55.

²³ *Mapp v. Ohio*, 367 U.S. 647, 660 (1961).

Clause, we can no longer permit it to be revocable at the whim of any police officer who, in the name of law enforcement itself, chooses to suspend its enjoyment."

To acknowledge appellant's constitutional rights, embodied in the Fourth and Fourteenth Amendments, and to permit the revocation of those rights upon the "whim of any police officer who, in the name of law enforcement" chooses to suspend them, would be tantamount to the eradication of those rights.

For the reasons stated, it is respectfully submitted that the judgment of the Court below should be reversed, the evidence seized from the appellant suppressed, and the indictment dismissed.

Respectfully submitted,

ROBERT STUART FRIEDMAN
Attorney for Appellant



FILED

SEP 30 1967

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 74

JOHN FRANCIS PETERS,

Appellant,

v.

STATE OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE
STATE OF NEW YORK

BRIEF FOR THE APPELLEE

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BRIEF FOR THE APPELLEE

Questions Presented

The following questions are presented by this appeal:

1. Is Section 180-a of the Code of Criminal Procedure of the State of New York, which provides for the stopping, questioning, and frisking of persons in public places violative of the Fourth and Fourteenth Amendments of the Constitution of the United States:

(a) Is Section 180-a of the Code of Criminal Procedure of the State of New York, because it permits the frisking of persons upon suspicion rather than and

in the absence of probable cause violative of the Fourth and Fourteenth Amendments of the Constitution of the United States of America?

(b) Is Section 180-a of the Code of Criminal Procedure of the State of New York as applied to the appellant, in permitting the stopping, questioning and frisking of the appellant violative of the Fourth and Fourteenth Amendments of the Constitution of the United States?

2. In view of the fact that the frisk of the appellant and the seizure of evidence from his person was not authorized by a lawfully issued search warrant or conducted pursuant to his consent, or as an incident to a lawful arrest, was the frisk of appellant's person and the seizure of evidence therefrom an unreasonable search and seizure in violation of the Fourth Amendment of the Constitution of the United States?

Statement

The appellant was arrested on July 10, 1964, in the City of Mount Vernon, New York. Whether he was arrested by officers of the Mount Vernon Police Department or by Patrolman Samuel L. Lasky, an off duty New York City officer, is problematical but largely unimportant. In either event he was charged with and ultimately indicted for the felony of Possession of Burglars' Tools in violation of the then Penal Law of the State of New York, § 408 (R. 1).

Following his indictment and arraignment on that charge before the County Court of Westchester County the appellant moved the County Court for an order pursuant to the New York Code of Criminal Procedure, §§ 813-c and 952-t, suppressing as evidence certain tools and instruments seized from him by Patrolman Lasky and further authorizing his inspection of the Grand Jury minutes or alterna-

tively, dismissing the indictment (R. 3, 4). The County Court denied this motion (R. 42) upon its decision that the evidence was properly seized (R. 36-41).

Thereafter the appellant pleaded guilty to the crime and misdemeanor of Unlawful Possession of Burglars' Tools. On January 4, 1965, he was sentenced by the County Court to a term of imprisonment of one year in the Westchester County Penitentiary. On January 5, 1965, the appellant filed a notice of appeal to the New York Supreme Court, Appellate Division, Second Judicial Department, and simultaneously therewith applied to the County Court of Westchester County for a certificate of reasonable doubt pursuant to the New York Code of Criminal Procedure, § 527. This was granted on January 13, 1965 (R. 43, 44), and the appellant was released from custody upon his posting bail in the amount of fifteen hundred dollars. On December 5, 1965, the Appellate Division of the New York Supreme Court, Second Department, unanimously affirmed the judgment of conviction and the intermediate order denying suppression (R. 45).

On December 16, 1965, permission to appeal to the New York Court of Appeals was granted to the appellant by Chief (then Associate) Judge Stanley H. Fuld of that Court. On July 7, 1966, the Court of Appeals by a divided court affirmed the order of the Appellate Division (R. 46-56).

On September 7, 1966, the appellant filed a notice of appeal to this Court, and on March 27, 1967, the Court noted probable jurisdiction (R. 59-63).

Facts

Samuel L. Lasky is a patrolman on the New York City Police Department of some eighteen years' experience (R. 17), and a resident of the City of Mount Vernon, New York (R. 14). On July 10, 1964, at about 1:00 p.m. Lasky

had just stepped out of the shower in his apartment on the sixth floor of the apartment building in which he lives and was drying himself when he heard a noise at his front door. At nearly the same time his telephone rang, and he answered it (R. 15). When he had completed the call he went to the door and looked through the peephole. He saw two men tiptoeing about the hallway. He telephoned the Mount Vernon police, dressed, and returned to the door where he again observed the two men, of whom the appellant was one, tiptoeing out of an alcove towards the stairway. Lasky, armed with his service revolver, ran out of the apartment and challenged the men. They fled, and he chased them down the stairs and apprehended the appellant between the fourth and fifth floors (R. 15, 16). The second man made good his escape.

When questioned by Lasky about his presence in the building the appellant claimed to be looking for a girlfriend, but he declined to identify her because she was a married woman (R. 21). It was established that the appellant did not reside in the building (R. 22, 28). Lasky frisked him for a weapon and felt in his right hand trousers pocket what might have been a knife (R. 21). He removed this object from the appellant's pocket and discovered it to be a plastic envelope containing six picks, a tension bar, and two Allen wrenches, with the short leg of each filed down to a screwdriver edge (R. 17). Lasky was qualified as an expert in investigations of burglaries and he identified this material as burglars' tools (R. 17).

Argument

Although more formally phrased under the heading "Questions Presented" the same concept can be as well stated by asking whether or not a police officer may stop and interrogate in a public place a person whom he reasonably suspects is committing, has committed or is about to commit a felony or any of approximately a dozen desig-

nated misdemeanors. The second question, if the first be answered affirmatively, is, having stopped such person, may the officer frisk him by patting his outer clothing in search of a weapon if the officer reasonably believes his life or limb to be in danger?

The Court will note that we have rejected a question suggested by the appellant and designated by him as Question 1 (b) in the appellant's brief. That question would tend to indicate that the New York Code of Criminal Procedure, Section 180-a, which is quoted in full in the appellant's brief (pp. 3-4), authorizes a police officer to arrest upon suspicion. It does not, of course, make such authorization, and the question is therefore inappropriate. For the purpose of clarity we will divide our argument in such a way as to suggest answers to the two questions the applicability of which we acknowledge.

POINT I

In the stated circumstances a police officer may stop and interrogate a person.

There is very little doubt that a police officer may stop, interrogate and even detain for a brief period an individual on somewhat less grounds than those upon which he would be entitled to arrest that individual. The reasons why this is so are varied. It has been said:

"When an officer encounters a man in a dark alley late at night, or under other circumstances which lead him to suspect that the man may be engaged in or have committed a crime, he should not immediately make an arrest, since answers to a question or two may instantly dispel his suspicions."

Warner, The Uniform Arrest Act, 28 Va. L. Rev. 315, 324.

The United States Court of Appeals for the 9th Circuit placed its justification for this right on other grounds. It said:

"Substantial considerations favor the recognition of a carefully limited right of brief police detention on less than probable cause to believe the person detained has committed a felony. If even slight interference with freedom of personal movement is invariably conditioned upon a showing of prior probable cause, then either the standard of probable cause will be lowered, and with it the protection against formal arrests and substantial interferences with liberty; or police activity which appears perfectly proper when measured against a standard of reasonableness will nonetheless be forbidden."

Gilbert v. United States, 366 F. 2d 923, 925.

The United States Court of Appeals for the 2d Circuit tends to agree with Professor Warner in saying:

"Nor do we question the power of the police, under proper circumstances and while investigating a crime, 'to detain suspects for reasonable periods of time in order to question them, check their stories, and to run down leads which either confirm or contradict those stories.' *United States ex rel. Corbo v. LaVallee*, 270 F. 2d 513, 518 (2 Cir. 1959), cert. denied sub nom. *LaVallee v. Corbo*, 361 U. S. 950, 80 S. Ct. 403, 4 L. Ed. 2d 382 (1960). This long-recognized prerogative is vital not only to crime prevention and detection, but also 'protects those who are readily able to exculpate themselves from being arrested and having formal charges made against them before their explanations are considered'. *United States v. Vita*, 294 F. 2d at 530. See also *United States v. Bonanno*, 180 F. Supp. 71 (S.D.N.Y. 1960)."

Middleton v. United States, 344 F. 2d 78, 83.

On whatever basis it be put it is submitted that this right of a police officer to stop and briefly to interrogate a suspicious individual in a public place unquestionably exists. See also *Rios v. United States*, 364 U. S. 253; *Lipton v. United States*, 348 F. 2d 591 (9th Cir.); *Keiningham v. United States*, 307 F. 2d 632 (D. C. Cir.); *United States v. Vita*, 294 F. 2d 524; *United States v. Bonanno*, 180 F. Supp. 71; *United States ex rel. Corbo v. LaVallee*, 270 F. 2d 513; *People v. Rivera*, 14 N. Y. 2d 441; *Gisske v. Jackson*, 164 Cal. App. 2d 759, 331 P. 2d 63; *Ellis v. United States*, 264 F. 2d 272; *Green v. United States*, 259 F. 2d 180.

Indeed, the appellant's principal protagonist in the New York Court of Appeals, Associate (now Chief) Judge Stanley H. Fuld, said in his dissenting opinion in *People v. Rivera*, *supra*, 14 N. Y. 441, 451:

"I have no doubt that the police, in the proper performance of their duties, have a responsibility to investigate suspicious activity and that one permissible form of investigation is the temporary stopping and questioning of individuals so engaged."

This Court has so ruled, *Rios v. United States*, *supra*, and has consistently declined to correct inferior courts which have so ruled, *Keiningham v. United States*, *supra*, 371 U. S. 948; *United States v. Vita*, *supra*, 364 U. S. 823; *United States ex rel. Corbo v. LaVallee*, sub nom. *LaVallee v. Corbo*, 361 U. S. 950; *People v. Rivera*, *supra*, sub nom. *Rivera v. New York*, 379 U. S. 978; *Ellis v. United States*, 359 U. S. 998; *Green v. United States*, 359 U. S. 917.

Because of the foregoing material, all of which uniformly grants to the police this right to stop and interrogate a suspected person, it is submitted that insofar as the question simply of stopping a suspect goes, that right and indeed duty of the police officer is undeniable.

POINT II

The police officer's frisking of the defendant was within constitutional limitations.

Amendments IV, and, in appropriate part, XIV to the United States Constitution read:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

It is apparent, therefore, that there is no general prescription against searches and that the only thing which is condemned is the *unreasonable* search. Reasonableness, though, or the lack of it cannot be measured in absolute terms. As this Court said in *Go-Bart v. United States*, 282 U. S. 344:

"There is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances."

That being so, it is submitted that there is and can be no hard and fast rule of what is a reasonable search and, conversely, what is an unreasonable search.

Thus, while we might abhor as unreasonable a general and uninhibited right to invade a person's clothing and to remove material therefrom, we can also recognize that in some circumstances such invasion and removal of property would not only be reasonable but eminently proper. As an example we could suggest the propriety of going through the personal effects of a person injured or taken sick in the street, and other illustrations of the point could easily be envisioned. The point is that circumstances alter cases, and because of that indisputable fact, the Constitution may not be said to establish any fixed line of demarcation below which *all* searches become illegal.

We have argued at Point I, *supra*, that a police officer has the right to stop and question a suspicious person. There is much to sustain and little to defeat the thesis that the policeman has more than a right, he has a duty to stop such persons and make inquiries of them. Certainly the State of New York has imposed such a duty upon its officers:

"The business of the police is to prevent crime if they can. Prompt inquiry into suspicious or unusual street action is an indispensable police power in the orderly government of large urban communities. It is a prime function of city police to be alert to things going wrong in the streets; if they were to be denied the right of such summary inquiry, a normal power and a necessary duty would be closed off."

People v. Rivera, supra, 14 N. Y. 2d 441, 444.

If such a duty does exist, then it is a frightening adjunct to that duty that the officer, while performing it, is prohibited from taking the most elemental precaution to safeguard his own life. Our society places a police officer on the street to guard it while it sleeps or goes about its other routine business, and it charges him with investigating the

activity of suspicious persons. It ought reasonably to offer him some acceptable way of assuring himself that these suspicious persons cannot kill or injure him with a concealed weapon while he is discharging that responsibility, because the anomaly of the thing is that the better and more conscientiously he does his job the greater is the hazard he faces. It is submitted that under limited conditions the "frisk" is the obvious answer.

On May 5, 1966, the day the present case was argued in the New York Court of Appeals, a story appeared in the White Plains Reporter Dispatch describing the death of a New Jersey state trooper. It was an Associated Press dispatch and probably appeared in newspapers all over the country. No attempt has been made to edit it, but we have italicized a point which we believe should command the Court's special attention:

"MAN IS HELD IN SLAYING OF TROOPER

"MOORESTOWN, N. J. (AP)—State police held a Brooklyn, N. Y., man today in connection with the early morning slaying of a state trooper on the New Jersey Turnpike.

"Police identified him as Daniel C. Kremens, about 33.

"He was walking in Paulsboro, south of Camden.

"Paulsboro is about 30 miles from where trooper Anthony Lukis Jr., 30, father of four children, was shot to death.

"Col. David B. Kelly, state police superintendent, said Lukis apparently was shot three times, once in the head and twice in the back, after he had stopped to check on a car parked on the shoulder of the Turnpike. *His own revolver was still in its holster.*

"First word of the slaying came from an unidentified truck driver who saw either a scuffle or something else amiss as he drove past the scene, Kelly said.

"The driver stopped further up the road and walked back. He found Lukis' body lying alongside his patrol car. The other car had disappeared.

"The trucker used the police car radio to report the incident.

"Lukis and his wife, Patricia, have a daughter, Kim-Marie, 7; and three sons, Paul, 6; Michael, 4; and Anthony, 18 months."

We are not arguing that if New Jersey had a statute comparable to New York's section 180-a, Trooper Lukis would have lived. The point is that he *might* have. It is quite likely that even *with* this law police officers will continue to be killed on duty because theirs is a dangerous occupation, but it seems nothing short of criminal to require them to expose themselves nakedly when the means of protecting them, at least a little, is so readily at hand. Professor Warner, the author of the Uniform Arrest Act, seems to agree when he writes:

"Today, good police practice often requires a police officer to 'frisk' a suspect before questioning him, that is, to pass his hands over the latter's outer clothing to make sure that no dangerous weapons are concealed on his person. When an officer encounters a man in a dark alley late at night, or under other circumstances which lead him to suspect that the man may be engaged in or have committed a crime, he should not immediately make an arrest, since answers to a question or two may instantly dispel his suspicions. Yet, it would be the height of folly to converse with the suspect without first making certain that the latter is not fingering the trigger of a pistol.

"A police officer does not, and should not, 'frisk' everyone he questions, or even everyone he suspects of having committed a serious crime. But for him to limit 'frisking' to persons he reasonably believes are carry-

ing concealed weapons is to risk his life needlessly. Therefore, the officer should 'frisk' every person he questions, when, because of the appearance of the person, the time and place, the small number of police officers present, the seriousness of the offense he is investigating, or other circumstances 'he reasonably believes that he is in danger if such person possesses a dangerous weapon.'"

Warner, The Uniform Arrest Act, supra, Va. L. Rev. 325, 324-325.

So also does the New York Court of Appeals:

"If we recognize the authority of the police to stop a person and inquire concerning unusual street events we are required to recognize the hazards involved in this kind of public duty. The answer to the question propounded may be a bullet; in any case the exposure to danger would be very great. We think the frisk is a reasonable and constitutionally permissible precaution to minimize that danger. We ought not, in deciding what is reasonable, close our eyes to the actualities of street dangers in performing this kind of public duty."

People v. Rivera, supra, 14 N. Y. 2d 441, 446.

"It is well recognized that the basis for a frisk is the concern for the well-being of the officer."

People v. Peters, 18 N. Y. 2d 238, 243.

It is therefore submitted that in the situations propounded by Professor Warner and in both the New York cases, *People v. Rivera*, 14 N. Y. 2d 441, cert. denied sub nom. *Rivera v. New York*, 379 U. S. 978; and *People v. Peters*, the instant case, 18 N. Y. 2d 238, the frisks were not unreasonable and hence not violative of the Constitution.

Up to this point we have discussed only the all but acknowledged right of the police officer to stop and question as that right has been conferred by the courts and the consequent right, dictated by reason, for him to frisk, in appropriate cases, for concealed weapons. We have adverted only passingly to Section 180-a of the New York Code of Criminal Procedure, and we turn now to a consideration of the statute.

The Court of Appeals pointed out in the opinion below:

"For in the last analysis the constitutionality of the statute is determined not so much by the language employed as by the conduct it authorizes."

People v. Peters, 18 N. Y. 2d 238, 245.

What plainly the Court of Appeals intended to convey is the thought that if a given course of conduct is legal and proper *without* a statute authorizing it, the same course of conduct remains legal and proper although it has now become statutory rather than decisional. If this Court did not see fit to conclude that the United States Constitution was violated by the holding of the New York Court of Appeals in *People v. Rivera*, *supra*, 14 N. Y. 2d 441, then it is difficult to understand how it may conclude fairly that Section 180-a of the New York Code of Criminal Procedure is unconstitutional. That section authorizes nothing further than the decisional authority already indicates the officer may do, and in some cases restricts it. For example, the officer operating under the statute may stop and interrogate only where the crime involved is one of a specified number and therefore may frisk in only those limited situations.

It is perfectly clear both from the manner in which the Court of Appeals interpreted Section 180-a and that in which it would be understood by the lay reader that the section makes no attempt to authorize the search of a sus-

pect for evidence. It only allows the policeman to *disarm* him if, after a superficial patting of his outer clothing, he determines that he has a weapon. If during such a frisk as the statute permits the officer finds a prohibited weapon, there will then be no problem, for in that event the officer will arrest him. If he finds no weapon, however, and if the frisk reveals nothing that is likely to be a weapon, the policeman is absolutely prohibited from conducting a search for evidence.

It is respectfully submitted that the officer's purpose in performing his duties with respect to this law is determinative on the point of its constitutionality. For example, to return to the man injured in the street, if a policeman removes this man's wallet from his pocket to identify him, we don't measure his actions against probable cause because we don't conceive of this as being a search. Consequently if contraband is found in that wallet, it will not be suppressed. Similarly if a police officer enters a private dwelling to investigate unusual sounds or odors that suggest that something is seriously wrong within, we don't characterize his entry as a search, and we don't concern ourselves with probable cause. This remains true even if, once inside, the officer is enabled to observe or to seize evidence of a crime, cf. *People v. Gallmon*, 19 N. Y. 2d 389; *Wayne v. United States*, 318 F. 2d 205, cert. denied 375 U. S. 806.

Thus it is, it is submitted, with Section 180-a. The officer's initial purpose not being that of searching for evidence but that entirely of obtaining control over the suspect's weapon if he has one, the procedure authorized by the section is not a search as envisioned by Amendment IV, and the criterion of probable cause need not be considered.

Furthermore, although superficially this case has no connection with *United States v. Ventresca*, 380 U. S. 102, there is a lesson to be learned from that case. This Court there concluded that a warrant to search was to be preferred to a search without a warrant because, in effect, the

application for a warrant interposed a neutral filter between the legitimate exercise of police authority and the citizen's right to be let alone. If in that area of the law the magistrate represents such a filter, then in the area of stopping and frisking the legislature, while recognizing that the policeman alone makes the immediate determination of whether to stop or not to stop, has, in having adopted specific restrictive standards governing when the policeman may stop a person, interposed itself as the same neutral filter between the unregulated use of police authority and the citizen's right freely to go about his business. To the extent that *United States v. Ventresca, supra*, commends to the courts the greater desirability of judicially endorsed searches that case applies here and suggests that statutorily sanctioned searches are to be preferred to those conducted within the exclusive discretion of the police officer.

Finally, as the New York Court of Appeals said in its opinion below:

"In the recent case of *Ker v. California*, eight Justices agreed on that part of the opinion which stated: 'The States are not thereby precluded from developing workable rules governing arrests, searches and seizures to meet 'the practical demands of effective criminal investigation and law enforcement' in the States, 'provided that those rules do not violate the constitutional proscription of unreasonable searches and seizures and the concomitant command that evidence so seized is inadmissible against one who has standing to complain' (374 U. S. 23, 34).

By judicial action in *Rivera* and legislative action in Section 180-a, our State has developed a reasonable and workable set of rules governing arrest, search and seizure. These rules are similar to those adopted in several other States, notably California whose criminal problems in large urban areas are similar to ours.

(See *People v. Martin*, 46 Cal. 2d 106; also *Kavanagh v. Stenhouse*, 93 R. I. 252, and *Commonwealth v. Lehan*, 347 Mass. 197)."

People v. Peters, supra, 18 N. Y. 2d 238, 247.

In sum, therefore, it is submitted that the New York Code of Criminal Procedure, Section 180-a, because it does not authorize an unreasonable stopping and searching, is not and cannot be violative of the United States Constitution.

CONCLUSION

The judgment appealed from should be affirmed.

Respectfully submitted,

LEONARD RUBENFELD,
District Attorney of
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JAMES J. DUGGAN,
Assistant District Attorney,
of Counsel.



NOV 9 1967

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1967

No. 74

JOHN FRANCIS PETERS,

Appellant,

v.

STATE OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE
STATE OF NEW YORK

SUPPLEMENTAL BRIEF FOR THE APPELLEE

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IN THE
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7 _____
SUPPLEMENTAL BRIEF FOR THE APPELLEE

Statement

This supplemental brief is submitted to the Court pursuant to Rule 41 (5) of the Rules of this Court in order to permit the appellee to comment on the newly decided case of *People v. Taggart*, 20 N. Y. 2d 335.

POINT II

It seems to be unavoidable that the paragraph of the appellee's ~~brief~~ which begins at the bottom of page 13

and ends at the top of page 14 be withdrawn due to the holding of the New York Court of Appeals in *People v. Taggart*, *supra*. The view which we expressed in the main brief, i.e., that the New York Code of Criminal Procedure, §180-a, did not authorize a search as opposed to a frisk, appeared to be warranted by the authorities then available, but it has now been invalidated by *Taggart*. We abandon our position with some reluctance, however, because it appears incontrovertible that the Court of Appeals endorsed the search in that case solely by reason of the highly exigent circumstances there presented.

Even the acknowledgment, though, that *Taggart* authorizes the full blown search referred to in *People v. Rivera*, 14 N. Y. 441, as contrasted with the more limited frisk does not require of the appellee the total surrender of its position. Not even *Taggart* may be read to permit a general search for evidence, for the case plainly holds that the Court of Appeals did no more than authorize a search to *disarm* the suspect. We said in our main brief that section 180-a "... only allows the policeman to *disarm* him if, after a superficial patting of his outer clothing, he determines that he has a weapon" (p. 14). Now in view of *Taggart* it would appear that a search is permitted, but a search for the same purpose as we proposed the frisk; the *disarming* of the suspect remains central. Since it does, we are right back to a determination of whether it is reasonable that a police officer be permitted to search a suspect whose potential for and capability of violent reaction to the initial permissible stop cannot be assessed where the officer has a reasonable suspicion that such a suspect is armed. It is submitted that it is reasonable and more; it is indispensable.

CONCLUSION

The judgment appealed from should be affirmed.

Respectfully submitted,

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Westchester County.

JAMES J. DUGGAN,
Assistant District Attorney,
of Counsel.

SUPREME COURT OF THE UNITED STATES

Nos. 63 AND 74.—OCTOBER TERM, 1967.

63 Nelson Sibron, Appellant,
v.
State of New York.
74 John Francis Peters, Appellant,
v.
State of New York.

On Appeals From the
Court of Appeals of
New York.

[June 10, 1968.]

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

These are companion cases to No. 67, *Terry v. Ohio*, ante, p. —, decided today. They present related questions under the Fourth and Fourteenth Amendments, but the cases arise in the context of New York's "stop-and-frisk" law, N. Y. Code Crim. Proc. § 180-a. This statute provides:

"1. A police officer may stop any person abroad in a public place whom he reasonably suspects is committing, has committed or is about to commit a felony or any of the crimes specified in section five hundred fifty-two of this chapter, and may demand of him his name, address and an explanation of his actions.

"2. When a police officer has stopped a person for questioning pursuant to this section and reasonably suspects that he is in danger of life or limb, he may search such person for a dangerous weapon. If the police officer finds such a weapon or any other thing the possession of which may constitute a crime, he may take and keep it until the completion of the questioning, at which time he shall either return it, if lawfully possessed, or arrest such person."

The appellants, Sibron and Peters, were both convicted of crimes in New York state courts on the basis of evidence seized from their persons by police officers. The Court of Appeals of New York held that the evidence was properly admitted, on the ground that the searches which uncovered it were authorized by the statute. *People v. Sibron*, 18 N. Y. 2d 603, 219 N. E. 2d 196, 272 N. Y. S. 2d 374 (1966) (Memorandum); *People v. Peters*, 18 N. Y. 2d 238, 219 N. E. 2d 595, 273 N. Y. S. 2d 217 (1966). Sibron and Peters have appealed their convictions to this Court, claiming that § 180-a is unconstitutional on its face and as construed and applied, because the searches and seizures which it was held to have authorized violated their rights under the Fourth Amendment, made applicable to the States by the Fourteenth. *Mapp v. Ohio*, 367 U. S. 643 (1961). We noted probable jurisdiction, 386 U. S. 954 (1967); 386 U. S. 980 (1967), and consolidated the two cases for argument with No. 67.

The facts in these cases may be stated briefly. Sibron, the appellant in No. 63, was convicted of the unlawful possession of heroin.¹ He moved before trial to suppress the heroin seized from his person by the arresting officer, Brooklyn Patrolman Anthony Martin. After the trial court denied his motion, Sibron pleaded guilty to the charge, preserving his right to appeal the evidentiary ruling.² At the hearing on the motion to suppress,

¹ N. Y. Pub. Health Law § 3305 makes the unauthorized possession of any narcotic drug unlawful, and N. Y. Pen. Law §§ 1751 and 1751-a make the grade of the offense depend upon the amount of the drugs found in the possession of the defendant. The complaint in this case originally charged a felony, but the trial court granted the prosecutor's motion to reduce the charge on the ground that "the Laboratory report will indicate a misdemeanor charge." Sibron was convicted of a misdemeanor and sentenced to six months in jail.

² N. Y. Code Crim. Proc. § 813-c provides that an order denying a motion to suppress evidence in a criminal case "may be reviewed

Officer Martin testified that while he was patrolling his beat in uniform on March 9, 1965, he observed Sibron "continually from the hours of 4:00 P. M. to 12:00, midnight . . . in the vicinity of 742 Broadway." He stated that during this period of time he saw Sibron in conversation with six or eight persons whom he (Patrolman Martin) knew from past experience to be narcotics addicts. The officer testified that he did not overhear any of these conversations, and that he did not see anything pass between Sibron and any of the others. Late in the evening Sibron entered a restaurant. Patrolman Martin saw Sibron speak with three more known addicts inside the restaurant. Once again, nothing was overheard and nothing was seen to pass between Sibron and the addicts. Sibron sat down and ordered pie and coffee, and as he was eating, Patrolman Martin approach him and told him to come outside. Once outside, the officer said to Sibron, "You know what I am after." According to the officer, Sibron "mumbled something and reached into his pocket." Simultaneously, Patrolman Martin thrust his hand into the same pocket, discovering several glassine envelopes, which, it turned out, contained heroin.

The State has had some difficulty in settling upon a theory for the admissibility of these envelopes of heroin. In his sworn complaint Patrolman Martin stated:

"As the officer approached the defendant, the latter being in the direction of the officer and seeing him, he did put his hand in his left jacket pocket and pulled out a tinfoil envelope and did attempt to throw same to the ground. The officer never losing sight of the said envelope seized it from the def[endan]t's left hand, examined it and found it to contain ten glascine [sic] envelopes with a white substance alleged to be Heroin."

on appeal from a judgment of conviction notwithstanding the fact that such judgment of conviction is predicated upon a plea of guilty."

This version of the encounter, however, bears very little resemblance to Patrolman Martin's testimony at the hearing on the motion to suppress. In fact, he discarded the abandonment theory at the hearing.³ Nor did the officer ever seriously suggest that he was in fear of bodily harm and that he searched Sibron in self-protection to find weapons.⁴

The prosecutor's theory at the hearing was that Patrolman Martin had probable cause to believe that Sibron was in possession of narcotics because he had seen him conversing with a number of known addicts over an eight-hour period. In the absence of any knowledge on Patrolman Martin's part concerning the nature of the

³ Patrolman Martin stated several times that he put his hand into Sibron's pocket and seized the heroin before Sibron had any opportunity to remove his own hand from the pocket. The trial court questioned him on this point:

"Q. Would you say at that time that he reached into his pocket and handed the packets to you? Is that what he did or did he drop the packets?

"A. He did not drop them. *I do not know what his intentions were.* He pushed his hand into his pocket.

"MR. JOSEPH [Prosecutor]: You intercepted it; didn't you, Officer?

"THE WITNESS: Yes." (Emphasis added.)

It is of course highly unlikely that Sibron, facing the officer at such close quarters, would have tried to remove the heroin from his pocket and throw it to the ground in the hope that he could escape responsibility for it.

⁴ The possibility that Sibron, who never, so far as appears from the record, offered any resistance, might have posed a danger to Patrolman Martin's safety was never even discussed as a potential justification for the search. The only mention of weapons by the officer in his entire testimony came in response to a leading question by Sibron's counsel, when Martin stated that he "thought he [Sibron] might have been" reaching for a gun. Even so, Patrolman Martin did not accept this suggestion by the opposition regarding the reason for his action; the discussion continued upon the plain premise that he had been looking for narcotics all the time.

intercourse between Sibron and the addicts, however, the trial court was inclined to grant the motion to suppress. As the judge stated, "All he knows about the unknown men: They are narcotics addicts. They might have been talking about the World Series. They might have been talking about prize fights." The prosecutor, however, reminded the judge that Sibron had admitted on the stand, in Patrolman Martin's absence, that he had been talking to the addicts about narcotics. Thereupon, the trial judge changed his mind and ruled that the officer had probable cause for an arrest.

Section 180-a, the "stop-and-frisk" statute, was not mentioned at any point in the trial court. The Appellate Term of the Supreme Court affirmed the conviction without opinion. In the Court of Appeals of New York, Sibron's case was consolidated with the *Peters* case, No. 74. The Court of Appeals held that the search in *Peters* was justified under the statute, but it wrote no opinion in Sibron's case. The dissents of Judges Fuld and Van Voorhis, however, indicate that the court rested its holding on § 180-a. At any rate, in its Brief in Opposition to the Jurisdictional Statement in this Court, the State sought to justify the search on the basis of the statute. After we noted probable jurisdiction, the District Attorney for Kings County confessed error.

Peters, the appellant in No. 74, was convicted of possessing burglary tools under circumstances evincing an intent to employ them in the commission of a crime.⁵ The tools were seized from his person at the time of his arrest, and like Sibron he made a pretrial motion to suppress them. When the trial court denied the motion, he too pleaded guilty, preserving his right to appeal. Offi-

⁵ N. Y. Pen. Law § 408 makes the possession of such tools under such circumstances a misdemeanor for first offenders and a felony for all those who have "been previously convicted of any crime." Peters was convicted of a felony under this section.

cer Samuel Lasky of the New York City Police Department testified at the hearing on the motion that he was at home in his apartment in Mount Vernon, New York, at about 1 p. m. on July 10, 1964. He had just finished taking a shower and was drying himself when he heard a noise at his door. His attempt to investigate was interrupted by a telephone call, but when he returned and looked through the peephole into the hall, Officer Lasky saw "two men tiptoeing out of the alcove toward the stairway." He immediately called the police, put on some civilian clothes and armed himself with his service revolver. Returning to the peephole, he saw "a tall man tiptoeing away from the alcove and followed by this shorter man, Mr. Peters, toward the stairway." Officer Lasky testified that he had lived in the 120-unit building for 12 years and that he did not recognize either of the men as tenants. Believing that he had happened upon the two men in the course of an attempted burglary,⁶ Officer Lasky opened his door, entered the hallway and slammed the door loudly behind him. This precipitated a flight down the stairs on the part of the two men,⁷ and

⁶ Officer Lasky testified that when he called the police immediately before leaving his apartment, he "told the Sergeant at the desk that two burglars were on my floor."

⁷ Officer Lasky testified that when he emerged from his apartment, "I slammed the door, I had my gun and I ran down the stairs after them." A sworn affidavit of the Assistant District Attorney, which was before the trial court when it ruled on the motion to suppress, stated that when apprehended Peters was "fleeing down the steps of the building." The trial court explicitly took note of the flight of Peters and his companion as a factor contributing to Officer Lasky's "reasonable suspicion" of them:

"We think the testimony at the hearing does not require further laboring of this aspect of the matter, unless one is to believe that it is legitimately normal for a man to tip-toe about in the public hall of an apartment house while on a visit to his unidentified girl-friend, and, when observed by another tenant, to rapidly descend by stairway in the presence of elevators."

Officer Lasky gave chase. His apartment was located on the sixth floor, and he apprehended Peters between the fourth and fifth floors. Grabbing Peters by the collar, he continued down another flight in unsuccessful pursuit of the other man. Peters explained his presence in the building to Officer Lasky by saying that he was visiting a girl friend. However, he declined to reveal the girl friend's name, on the ground that she was a married woman. Officer Lasky patted Peters down for weapons, and discovered a hard object in his pocket. He stated at the hearing that the object did not feel like a gun, but that it might have been a knife. He removed the object from Peters' pocket. It was an opaque plastic envelope, containing burglar's tools.

The trial court explicitly refused to credit Peters' testimony that he was merely in the building to visit his girl friend. It found that Officer Lasky had the requisite "reasonable suspicion" of Peters under § 180-a to stop him and question him. It also found that Peters' response was "clearly unsatisfactory," and that "under the circumstances Lasky's action in frisking Peters for a dangerous weapon was reasonable, even though Lasky was himself armed." It held that the hallway of the apartment building was a "public place" within the meaning of the statute. The Appellate Division of the Supreme Court affirmed without opinion. The Court of Appeals also affirmed, essentially adopting the reasoning of the trial judge, with Judges Fuld and Van Voorhis dissenting separately.

I.

At the outset we must deal with the question whether we have jurisdiction in No. 63. It is asserted that because Sibron has completed service of the six-month sentence imposed upon him as a result of his conviction, the case has become moot under *St. Pierre v. United*

States, 319 U. S. 41 (1943).⁸ We have concluded that the case is not moot.

In the first place, it is clear that the broad dictum with which the Court commenced its discussion in *St. Pierre*—that “the case is moot because, after petitioner’s service of his sentence and its expiration, there was no longer a subject matter on which the judgment of this Court could operate” (319 U. S., at 42)—fails to take account of significant qualifications recognized in *St. Pierre* and developed in later cases. Only a few days ago we held unanimously that the writ of habeas corpus was available to test the constitutionality of a state conviction where the petitioner had been in custody when he applied for the writ, but had been released before this Court could adjudicate his claims. *Carafas v. LaVallee*, — U. S. — (1968). On numerous occasions in the past this Court has proceeded to adjudicate the merits of

⁸ The first suggestion of mootness in this case came upon oral argument, when it was revealed for the first time that appellant had been released. This fact did not appear in the record, despite the fact that the release occurred well over two years before the case was argued here. Nor was mootness hinted at by the State in its Brief in Opposition to the Jurisdictional Statement in this Court—where it took the position that the decision below was so clearly right that it did not merit further review—or in its brief on the merits—in which it conceded that the decision below clearly violated Sibron’s constitutional rights and urged that it was an aberrant interpretation which should not impair the constitutionality of the New York statute. Following the suggestion of mootness on oral argument, moreover, the State filed a brief in which it amplified its views as to why the case should be held moot, but added the extraordinary suggestion that this Court should ignore the problem and pronounce upon the constitutionality of a statute in a case which has become moot. Normally in these circumstances we would consider ourselves fully justified in foreclosing a party upon an issue; however, since the question goes to the very existence of a controversy for us to adjudicate, we have undertaken to review it.

criminal cases in which the sentence had been fully served or the probationary period during which a suspended sentence could be reimposed had terminated. *Ginsberg v. New York*, — U. S. — (1968); *Pollard v. United States*, 352 U. S. 354 (1957); *United States v. Morgan*, 346 U. S. 502 (1954); *Fiswick v. United States*, 329 U. S. 211 (1946). Thus mere release of the prisoner does not mechanically foreclose consideration of the merits by this Court.

St. Pierre itself recognized two possible exceptions to its "doctrine" of mootness, and both of them appear to us to be applicable here. The Court stated that "It does not appear that petitioner could not have brought his case to this Court for review before the expiration of his sentence," noting also that because the petitioner's conviction was for contempt and because his controversy with the Government was a continuing one, there was a good chance that there would be "ample opportunity to review" the important question presented on the merits in a future proceeding. 319 U. S., at 43. This was a plain recognition of the vital importance of keeping open avenues of judicial review of deprivations of constitutional right.⁹ There was no way for Sibrón to bring his case here before his six-month sentence expired. By statute he was precluded from obtaining bail pending appeal,¹⁰ and by virtue of the inevitable delays of the New York court system, he was released less than a month after his newly appointed appellate counsel had been supplied with a copy of the transcript and roughly

⁹ Cf. *Fay v. Noia*, 372 U. S. 391, 424 (1963):

"[C]onventional notions of finality in criminal litigation cannot be permitted to defeat the manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review."

¹⁰ See N. Y. Code Crim. Proc. § 555 (2).

two months before it was physically possible to present his case to the first tier in the state appellate court system.¹¹ This was true despite the fact that he took all steps to perfect his appeal in a prompt, diligent and timely manner.

Many deep and abiding constitutional problems are encountered primarily at a level of "low visibility" in the criminal process—in the context of prosecutions for "minor" offenses which carry only short sentences.¹² We do not believe that the Constitution contemplates that people deprived of constitutional rights at this level should be left utterly remediless and defenseless against repetitions of unconstitutional conduct. A State may not cut off federal review of whole classes of such cases by the simple expedient of a blanket denial of bail pending appeal. As *St. Pierre* clearly recognized, a State may not effectively deny a convict access to the courts until he has been released and then argue that his case has been mooted by his failure to do what it alone prevented him from doing.¹³

¹¹ Sibron was arrested on March 9, 1965, and was unable to make bail before trial because of his indigency. He thus remained in jail from that time until the expiration of his sentence (with good time credit) on July 10, 1965. He was convicted on April 23. His application for leave to proceed *in forma pauperis* was not granted until May 14, and his assigned appellate counsel was not provided with a transcript until June 11. The Appellate Term of the Supreme Court recessed on June 7 until September. Thus Sibron was released well before there had been any opportunity even to argue his case in the intermediate state appellate court. A decision by the Court of Appeals of New York was not had until July 10, 1966, the anniversary of Sibron's release.

¹² Cf., e. g., *Thompson v. City of Louisville*, 362 U. S. 199 (1960).

¹³ In *St. Pierre* the Court noted that the petitioner could have taken steps to preserve his case, but that "he did not apply to this Court for a stay or a supersedeas." 319 U. S., at 43. Here however, it is abundantly clear that there is no procedure of which Sibron could have availed himself to prevent the expiration of his

The second exception recognized in *St. Pierre* permits adjudication of the merits of a criminal case where "under either state or federal law further penalties or disabilities can be imposed . . . as a result of the judgment which has . . . been satisfied." 319 U. S., at 43. Subsequent cases have expanded this exception to the point where it may realistically be said that inroads have been made upon the principle itself. *St. Pierre* implied that the burden was upon the convict to show the existence of collateral legal consequences. Three years later in *Fiswick v. United States*, 329 U. S. 211 (1946), however, the Court held that a criminal case had not become moot upon release of the prisoner, noting that the convict, an alien, might be subject to deportation for having committed a crime of "moral turpitude,"—even though it had never been held (and the Court refused to hold) that the crime of which he was convicted fell into this category. The Court also pointed to the fact that if the petitioner should in the future decide he wanted to

sentence long before this Court could hear his case. A supersedeas from this Court is a purely ancillary writ, and may issue only in connection with an appeal actually taken. *Ex parte Ralston*, 119 U. S. 613 (1887); Sup. Ct. Rule 18; see R. Robertson & F. Kirkham, *Jurisdiction of the Supreme Court of the United States* § 435, at 883 (R. Wolfson & P. Kurland, ed. 1951). At the time Sibron completed service of his sentence, the only judgment outstanding was the conviction itself, rendered by the Criminal Court of the City of New York, County of Kings. This Court had no jurisdiction to hear an appeal from that judgment, since it was not rendered by the "highest court of a State in which a decision could be had," 28 U. S. C. § 1257, and there could be no warrant for interference with the orderly appellate processes of the state courts. Thus no supersedeas could have issued. Nor could this Court have ordered Sibron admitted to bail before the expiration of his sentence, since the offense was not bailable, 18 U. S. C. § 3144; see n. 10, *supra*. Thus this case is distinguishable from *St. Pierre* in that Sibron "could not have brought his case to this Court for review before the expiration of his sentence." 319 U. S., at 43.

become an American citizen, he might have difficulty proving that he was of "good moral character." *Id.*, at 222.¹⁴

The next case which dealt with the problem of collateral consequences was *United States v. Morgan*, 346 U. S. 502 (1954). There the convict had probably been subjected to a higher sentence as a recidivist by a state court on account of the old federal conviction which he sought to attack. But as the dissent pointed out, there was no indication that the recidivist increment would be removed from his state sentence upon invalidation of the federal conviction, *id.*, at 516, n. 4, and the Court chose to rest its holding that the case was not moot upon a broader view of the matter. Without canvassing the possible disabilities which might be imposed upon Morgan or alluding specifically to the recidivist sentence, the Court stated:

"Although the term has been served, the results of the conviction may persist. Subsequent convictions may carry heavier penalties, civil rights may be affected. As the power to remedy an invalid sentence exists, we think, respondent is entitled to an opportunity to show that this conviction is invalid." *Id.*, at 512-513.

Three years later, in *Pollard v. United States*, 352 U. S. 354 (1957), the Court abandoned all inquiry into the actual existence of specific collateral consequences and in effect presumed that they existed. With nothing more than citations to *Morgan* and *Fiswick*, and

¹⁴ Compare *Ginsberg, v. New York*, — U. S. —, —, n. 2 (1968), where this Court held that the mere possibility that the Commissioner of Buildings of the Town of Hempstead, New York, might "in his discretion" attempt in the future to revoke a license to run a luncheonette because of a single conviction for selling relatively inoffensive "girlie" magazines to a 16-year-old boy was sufficient to preserve a criminal case from mootness.

a statement that "convictions may entail collateral legal disadvantages in the future," *id.*, at 358, the Court concluded that "The possibility of consequences collateral to the imposition of sentence is sufficiently substantial to justify our dealing with the merits." *Ibid.* The Court thus acknowledged the obvious fact of life that most criminal convictions do in fact entail adverse collateral legal consequences.¹⁵ The mere "possibility" that this will be the case is enough to preserve a criminal case from ending "ignominiously in the limbo of mootness." *Parker v. Ellis*, 362 U. S. 574, 577 (1960) (dissenting opinion).

This case certainly meets that test for survival. Without pausing to canvass the possibilities in detail, we note that New York expressly provides by statute that Sibron's conviction may be used to impeach his character should he choose to put it in issue at any future criminal trial, N. Y. Code Crim. Proc. § 393-c, and that it must be submitted to a trial judge for his consideration in sentencing should Sibron again be convicted of a crime, N. Y. Code Crim. Proc. § 482. There are doubtless other collateral consequences. Moreover, we see no relevance in the fact that Sibron is a multiple offender. Morgan was a multiple offender, see 346 U. S. at 503-504, and so was Pollard, see 352 U. S., at 355-357. A judge or jury faced with a question of character, like a sentencing judge, may be inclined to forgive or at least discount a limited number of minor transgressions, particularly if they occurred at some time in the relatively distant past.¹⁶ It is impossible for this Court to

¹⁵ See generally Note, 53 Va. L. Rev. 403 (1967).

¹⁶ We do not know from the record how many convictions Sibron had, for what crimes, or when they were rendered. At the hearing he admitted to a 1955 conviction for burglary and a 1957 misdemeanor conviction for possession of narcotics. He also admitted that he had other convictions, but none were specifically alluded to.

say at what point the number of convictions on a man's record renders his reputation irredeemable.¹⁷ And even if we believed that an individual had reached that point, it would be impossible for us to say that he had no interest in beginning the process of redemption with the particular case sought to be adjudicated. We cannot foretell what opportunities might present themselves in the future for the removal of other convictions from an individual's record. The question of the validity of a criminal conviction can arise in many contexts, compare *Burgett v. Texas*, 389 U. S. 107 (1967), and sooner the issue is fully litigated the better for all concerned. It is always preferable to litigate a matter when it is directly and principally in dispute, rather than in a proceeding where it is collateral to the central controversy. Moreover, litigation is better conducted when the dispute is fresh and additional facts may, if necessary, be taken without a substantial risk that witnesses will die or memories fade. And it is far better to eliminate the source of a potential legal disability than to require the citizen to suffer the possibly unjustified consequences of the disability itself for an indefinite period of time before he can secure adjudication of the State's right to impose it on the basis of some past action. Cf. *Peyton v. Rowe*, — U. S. —, — (1968).¹⁸

None of the concededly imperative policies behind the constitutional rule against entertaining moot con-

¹⁷ We note that there is a clear distinction between a general impairment of credibility, to which the Court referred in *St. Pierre*; see 319 U. S., at 43, and New York's specific statutory authorization for use of the conviction to impeach the "character" of a defendant in a criminal proceeding. The latter is a clear legal disability deliberately and specifically imposed by the legislature.

¹⁸ This factor has clearly been considered relevant by the Court in the past in determining the issue of mootness. See *Fiswick v. United States*, 329 U. S. 211, 221-222 (1946).

troversies would be served by a dismissal in this case. There is nothing abstract, feigned or hypothetical about Sibron's appeal. Nor is there any suggestion that either Sibron or the State has been wanting in diligence or fervor in the litigation. We have before us a fully developed record of testimony about contested historical facts, which reflects the "impact of actuality"¹⁹ to a far greater degree than many controversies accepted for adjudication as a matter of course under the Federal Declaratory Judgment Act, 28 U. S. C. § 2201.

St. Pierre v. United States, *supra*, must be read in light of later cases to mean that a criminal case is moot only if it is shown that there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction. That certainly is not the case here. Sibron "has a substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed on him." *Fiswick v. United States*, *supra*, at 222. The case is not moot.

II.

We deal next with the confession of error by the District Attorney for Kings County in No. 63. Confessions of error are, of course, entitled to and given great weight, but they do not "relieve this Court of the performance of the judicial function." *Young v. United States*, 315 U. S. 257, 258 (1942). It is the uniform practice of this Court to conduct its own examination of the record in all cases where the Federal Government or a State confesses that a conviction has been erroneously obtained. For one thing, as we noted in *Young*, "our judgments are precedents, and the proper administration of the criminal law cannot be left merely to the stipulation of the

¹⁹ Frankfurter, A Note on Advisory Opinions, 37 Harv. L. Rev. 1002, 1006 (1924). See also *Parker v. Ellis*, 362 U. S. 574, 592-593 (1960) (dissenting opinion).

parties." 315 U. S., at 259. See also *Marino v. Ragen*, 332 U. S. 561 (1947). This consideration is entitled to special weight where, as in this case, we deal with a judgment of a State's highest court interpreting a state statute which is challenged on constitutional grounds. The need for such authoritative declarations of state law in sensitive constitutional contexts has been the very reason for the development of the abstention doctrine by this Court. See, e. g., *Railroad Comm'n v. Pullman Co.*, 312 U. S. 496 (1941). Such a judgment is the final product of a sovereign judicial system, and is deserving of respectful treatment by this Court. Moreover, in this case the confession of error on behalf of the entire state executive and judicial branches is made, not by a state official, but by the elected legal officer of one political subdivision within the State. The District Attorney for Kings County seems to have come late to the opinion that this conviction violated Sibron's constitutional rights. For us to accept his view blindly in the circumstances, when a majority of the Court of Appeals of New York has expressed the contrary view, would be a disservice to the State of New York and an abdication of our obligation to lower courts to decide cases upon proper constitutional grounds in a manner which permits them to conform their future behavior to the demands of the Constitution. We turn to the merits.

III.

The parties on both sides of these two cases have urged that the principal issue before us is the constitutionality of § 180—a "on its face." We decline, however, to be drawn into what we view as the abstract and unproductive exercise of laying the extraordinarily elastic categories of § 180—a next to the categories of the Fourth Amendment in an effort to determine whether the two are in some sense compatible. The constitutional valid-

ity of a warrantless search is pre-eminently the sort of question which can only be decided in the concrete factual context of the individual case. In this respect it is quite different from the question of the adequacy of the procedural safeguards written into a statute which purports to authorize the issuance of search warrants in certain circumstances. See *Berger v. New York*, 388 U. S. 41 (1967). No search required to be made under a warrant is valid if the procedure for the issuance of the warrant is inadequate to ensure the sort of neutral contemplation by a magistrate of the grounds for the search and its proposed scope, which lies at the heart of the Fourth Amendment. *E. g.*, *Aguilar v. Texas*, 378 U. S. 108 (1964); *Giordenello v. United States*, 357 U. S. 480 (1958). This Court held last Term in *Berger v. New York*, *supra*, that N. Y. Code Crim Proc. § 813-a, which established a procedure for the issuance of search warrants to permit electronic eavesdropping, failed to embody the safeguards demanded by the Fourth and Fourteenth Amendments.

Section 180-a, unlike § 813-a, deals with the substantive validity of certain types of seizures and searches without warrants. It purports to authorize police officers to "stop" people, "demand" explanations of them and "search [them] for dangerous weapon[s]" in certain circumstances upon "reasonable suspicion" that they are engaged in criminal activity and that they represent a danger to the policeman. The operative categories of § 180-a are not the categories of the Fourth Amendment, and they are susceptible of a wide variety of interpretations.²⁰ New York is, of course, free to develop its own

²⁰ It is not apparent, for example, whether the power to "stop" granted by the statute entails a power to "detain" for investigation or interrogation upon less than probable cause, or if so what sort of durational limitations upon such detention are contemplated. And while the statute's apparent grant of a power of compulsion

law of search and seizure to meet the needs of local law enforcement, see *Ker v. California*, 374 U. S. 23, 34 (1963), and in the process it may call the standards it employs by any names it may choose. It may not, how-

indicates that many "stops" will constitute "seizures," it is not clear that all conduct analyzed under the rubric of the statute will either rise to the level of a "seizure" or be based upon less than probable cause. In No. 74, the *Peters* case, for example, the New York courts justified the seizure of appellant under § 180-a, but we have concluded that there was in fact probable cause for an arrest when Officer Lasky seized Peters on the stairway. See pp. —, *infra*. In any event, a pronouncement by this Court upon the abstract validity of § 180-a's "stop" category would be most inappropriate in these cases, since we have concluded that neither of them presents the question of the validity of a seizure of the person for purposes of interrogation upon less than probable cause. See pp. —, *infra*.

The statute's other categories are equally elastic, and it was passed too recently for the State's highest court to have ruled upon many of the questions involving potential intersections with federal constitutional guarantees. We cannot tell, for example, whether the officer's power to "demand" of a person an "explanation of his actions" contemplates either an obligation on the part of the citizen to answer or some additional power on the part of the officer in the event of a refusal to answer, or even whether the interrogation following the "stop" is "custodial." Compare *Miranda v. Arizona*, 384 U. S. 436 (1966). There are, moreover, substantial indications that the statutory category of a "search for a dangerous weapon" may encompass conduct considerably broader in scope than that which we approved in *Terry v. Ohio*, *ante*, p. —. See pp. —, *infra*. See also *People v. Taggart*, 20 N. Y. 2d 335, — N. E. 2d —, — N. Y. S. 2d — (1967). At least some of the activity apparently permitted under the rubric of searching for dangerous weapons may thus be permissible under the Constitution only if the "reasonable suspicion" of criminal activity rises to the level of probable cause. Finally, it is impossible to tell whether the standard of "reasonable suspicion" connotes the same sort of specificity, reliability, and objectivity which is the touchstone of permissible governmental action under the Fourth Amendment. Compare *Terry v. Ohio*, *supra*, with *People v. Taggart*, *supra*. In this connection we note that the searches and seizures in both *Sibron* and *Peters* were upheld by the Court of Appeals of New York as predicated upon "reasonable

ever, authorize police conduct which trenches upon Fourth Amendment rights, regardless of the labels which it attaches to such conduct. The question in this Court upon review of a state-approved search or seizure "it not whether the search [or seizure] was authorized by state law. The question is rather whether the search was reasonable under the Fourth Amendment. Just as a search authorized by state law may be an unreasonable one under that amendment, so may a search not expressly authorized by state law be justified as a constitutionally reasonable one." *Cooper v. California*, 386 U. S. 58, 61 (1967).

Accordingly, we make no pronouncement on the facial constitutionality of § 180-a. The constitutional point with respect to a statute of this peculiar sort, as the Court of Appeals of New York recognized, is "not so much . . . the language employed as . . . the conduct it authorizes." *People v. Peters*, 18 N. Y. 2d 238, 245, 219 N. E. 2d 595, 599, 273 N. Y. S. 2d 217, 222 (1966). We have held today in *Terry v. Ohio*, ante, p. —, that police conduct of the sort with which § 180-a deals must be judged under the Reasonable Search and Seizure Clause of the Fourth Amendment. The inquiry under that clause may differ sharply from the inquiry set up by the categories of § 180-a. Our constitutional inquiry would not be furthered here by an attempt to pronounce judgment on the words of the statute. We must confine our review instead to the reasonableness of the searches and seizures which underlie these two convictions.

IV.

Turning to the facts of Sibron's case, it is clear that the heroin was inadmissible in evidence against him.

suspicion," whereas we have concluded that the officer in *Peters* had probable cause for an arrest, while the policeman in *Sibron* was not possessed of any information which would justify an intrusion upon rights protected by the Fourth Amendment.

The prosecution has quite properly abandoned the notion that there was probable cause to arrest Sibron for any crime at the time Patrolman Martin accosted him in the restaurant, took him outside and searched him. The officer was not acquainted with Sibron and had no information concerning him. He merely saw Sibron talking to a number of known narcotics addicts over a period of eight hours. It must be emphasized that Patrolman Martin was completely ignorant regarding the content of these conversations, and that he saw nothing pass between Sibron and the addicts. So far as he knew, they might indeed "have been talking about the World Series." The inference that persons who talk to narcotics addicts are engaged in the criminal traffic in narcotics is simply not the sort of reasonable inference required to support an intrusion by the police upon an individual's personal security. Nothing resembling probable cause existed until after the search had turned up the envelopes of heroin. It is axiomatic that an incident search may not precede an arrest and serve as part of its justification. *E. g., Henry v. United States*, 361 U. S. 98 (1959); *Johnson v. United States*, 333 U. S. 10, 16-17 (1948). Thus the search cannot be justified as incident to a lawful arrest.

If Patrolman Martin lacked probable cause for an arrest, however, his seizure and search of Sibron might still have been justified at the outset if he had reasonable grounds to believe that Sibron was armed and dangerous. *Terry v. Ohio*, ante, p. —. We are not called upon to decide in this case whether there was a "seizure" of Sibron inside the restaurant antecedent to the physical seizure which accompanied the search. The record is unclear with respect to what transpired between Sibron and the officer inside the restaurant. It is totally barren of any indication whether Sibron accompanied Patrolman Martin outside in submission

to a show of force or authority which left him no choice, or whether he went voluntarily in a spirit of apparent cooperation with the officer's investigation. In any event, this deficiency in the record is immaterial, since Patrolman Martin obtained no new information in the interval between his initiation of the encounter in the restaurant and his physical seizure and search of Sibron outside.

Although the Court of Appeals of New York wrote no opinion in this case, it seems to have viewed the search here as a self-protective search for weapons and to have affirmed on the basis of § 180-a, which authorizes such a search when the officer "reasonably suspects that he is in danger of life or limb." The Court of Appeals has, at any rate, justified searches during field interrogation on the ground that "the answer to the question propounded by the policeman may be a bullet; in any case the exposure to danger could be very great." *People v. Rivera*, 14 N. Y. 2d 441, 446, 201 N. E. 2d 32, 35, 252 N. Y. S. 2d 458, 463 (1964), cert. denied, 379 U. S. 978 (1965). But the application of this reasoning to the facts of this case proves too much. The police officer is not entitled to seize and search every person whom he sees on the street or of whom he makes inquiries. Before he places a hand on the person of a citizen in search of anything, he must have constitutionally adequate reasonable grounds for doing so. In the case of the self-protective search for weapons, he must be able to point to particular facts from which he reasonably inferred that the individual was armed and dangerous. *Terry v. Ohio*, *supra*. Patrolman Martin's testimony reveals no such facts. The suspect's mere act of talking with a number of known narcotics addicts over an eight-hour period no more gives rise to reasonable fear of life or limb on the part of the police officer than it justifies an arrest

for committing a crime. Nor did Patrolman Martin urge that when Sibron put his hand in his pocket, he feared that he was going for a weapon and acted in self-defense. His opening statement to Sibron—"You know what I am after"—made it abundantly clear that he sought narcotics, and his testimony at the hearing left no doubt that he thought there were narcotics in Sibron's pocket.²¹

Even assuming *arguendo* that there were adequate grounds to search Sibron for weapons, the nature and

²¹ It is argued in dissent that this Court has in effect overturned factual findings by the two courts below that the search in this case was a self-protective measure on the part of Patrolman Martin, who thought that Sibron might have been reaching for a gun. It is true, as we have noted, that the Court of Appeals of New York apparently rested its approval of the search on this view. The trial court, however, made no such finding of fact. The trial judge adopted the theory of the prosecution at the hearing on the motion to suppress. This theory was that there was probable cause to arrest Sibron for some crime having to do with narcotics. The fact which tipped the scales for the trial court had nothing to do with danger to the policeman. The judge expressly changed his original view and held the heroin admissible upon being reminded that Sibron had admitted on the stand that he spoke to the addicts about narcotics. This admission was not relevant on the issue of probable cause, and we do not understand the dissent to take the position that prior to the discovery of heroin, there was probable cause for an arrest.

Moreover, Patrolman Martin himself never at any time put forth the notion that he acted to protect himself. As we have noted, this subject never came up, until on re-direct examination defense counsel raised the question whether Patrolman Martin thought Sibron was going for a gun. See n. 4, *supra*. This was the only reference to weapons at any point in the hearing, and the subject was swiftly dropped. In the circumstances an unarticulated "finding" by an appellate court which wrote no opinion, apparently to the effect that the officer's invasion of Sibron's person comported with the Constitution because of the need to protect himself, is not deserving of controlling deference.

scope of the search conducted by Patrolman Martin were so clearly unrelated to that justification as to render the heroin inadmissible. The search for weapons approved in *Terry* consisted solely of a limited patting of the outer clothing of the suspect for concealed objects which might be used as instruments of assault. Only when he discovered such objects did the officer in *Terry* place his hands in the pockets of the men he searched. In this case, with no attempt at an initial limited exploration for arms, Patrolman Martin thrust his hand into Sibron's pocket and took from him envelopes of heroin. His testimony shows that he was looking for narcotics, and he found them. The search was not reasonably limited in scope to the accomplishment of the only goal which might conceivably have justified its inception—the protection of the officer by disarming a potentially dangerous man. Such a search violates the guarantee of the Fourth Amendment, which protects the sanctity of the person against unreasonable intrusions on the part of all government agents.

V.

We think it is equally clear that the search in *Peters*' case was wholly reasonable under the Constitution. The Court of Appeals of New York held that the search was made legal by § 180-a, since *Peters* was "abroad in a public place," and since Officer Lasky was reasonably suspicious of his activities and, once he had stopped *Peters*, reasonably suspected that he was in danger of life or limb, even though he held *Peters* at gun point. This may be the justification for the search under state law. We think, however, that for purposes of the Fourth Amendment the search was properly incident to a lawful arrest. By the time Officer Lasky caught up with *Peters* on the stairway between the fourth and fifth floors of the apartment building, he had probable cause to arrest him for attempted burglary. The officer heard strange

noises at his door which apparently led him to believe that someone sought to force entry. When he investigated these noises he saw two men, whom he had never seen before in his 12 years in the building, tiptoeing furtively about the hallway. They were still engaged in these maneuvers after he called the police and dressed hurriedly. And when Officer Lasky entered the hallway, the men fled down the stairs. It is difficult to conceive of stronger grounds for an arrest, short of actual eyewitness observation of criminal activity. As the trial court explicitly recognized,²² deliberately furtive actions and flight at the approach of strangers or law officers are strong indicia of *mens rea*, and when coupled with specific knowledge on the part of the officer relating the suspect to the evidence of crime, they are proper factors to be considered in the decision to make an arrest. *Brinegar v. United States*, 338 U. S. 160 (1949); *Husty v. United States*, 282 U. S. 694 (1931); see *Henry v. United States*, 361 U. S. 98, 103 (1959).

As we noted in *Sibron's* case, a search incident to a lawful arrest, may not precede the arrest and serve as part of its justification. It is a question of fact precisely when, in each case, the arrest took place. *Rios v. United States*, 364 U. S. 253, 261-262 (1960). And while there was some inconclusive discussion in the trial court concerning when Officer Lasky "arrested" Peters, it is clear that the arrest had for purposes of constitutional justification already taken place before the search commenced. When the policeman grabbed Peters by the collar, he abruptly "seized" him and curtailed his freedom of movement on the basis of probable cause to believe that he was engaged in criminal activity. See *Henry v. United States*, *supra*, at 103. At that point he had the authority to search Peters, and the incident search was

²² See n. 6, *supra*.

obviously justified "by the need to seize weapons and other things which might be used to assault an officer or effect an escape, as well as by the need to prevent the destruction of evidence of the crime." *Preston v. United States*, 376 U. S. 364, 367 (1964). Moreover, it was reasonably limited in scope by these purposes. Officer Lasky did not engage in an unrestrained and thoroughgoing examination of Peters and his personal effects. He seized him to cut short his flight, and he searched him primarily for weapons. While patting down his outer clothing, Officer Lasky discovered an object in his pocket which might have been used as a weapon. He seized it and discovered it to be a potential instrument of the crime of burglary.

We have concluded that Peters' conviction fully comports with the commands of the Fourth and Fourteenth Amendments, and must be affirmed. The conviction in No. 63, however, must be reversed, on the ground that the heroin was unconstitutionally admitted in evidence against the appellant.

It is so ordered.



SUPREME COURT OF THE UNITED STATES

No. 63.—OCTOBER TERM, 1967.

Nelson Sibron, Appellant, v. State of New York.	On Appeal From the Court of Appeals of New York.
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[June 10, 1968.]

MR. JUSTICE DOUGLAS, concurring.

Officer Martin testified that on the night in question he observed petitioner Sibron continually from 4 p. m. to 12 midnight and that during that eight-hour period, Sibron conversed with different persons each personally known to Martin as narcotics addicts. When Sibron entered a restaurant, Martin followed him inside where he observed Sibron talking to three other persons also personally known to Martin as narcotics addicts. At that point he approached Sibron and asked him to come outside. When Sibron stepped out, Martin said, "You know what I am after." Sibron then reached inside his pocket, and at the same time Martin reached into the same pocket and discovered several glassine envelopes which were found to contain heroin. Sibron was subsequently convicted of unlawful possession of heroin.

Consorting with criminals may in a particular factual setting be a basis for believing that a criminal project is underway. Yet talking with addicts without more rises no higher than suspicion. That is all we have here; and if it is sufficient for a "seizure" and a "search," then there is no such thing as privacy for this vast group of "sick" people.

SUPREME COURT OF THE UNITED STATES

No. 74.—OCTOBER TERM, 1967.

John Francis Peters, Appellant,	On Appeal From the	
v.		Court of Appeals of
State of New York.		New York.

[June 10, 1968.]

MR. JUSTICE DOUGLAS, concurring.

Officer Lasky testified that he resided in a multiple dwelling apartment house in Mount Vernon, New York. His apartment was on the sixth floor. At about 1 in the afternoon, he had just stepped out of the shower and was drying himself when he heard a noise at his door. Just then his phone rang and he answered the call. After hanging up, he looked through the peephole of his door and saw two men, one of whom was petitioner, tiptoeing out of an alcove toward the stairway. He phoned his headquarters to report this occurrence, and then put on some clothes and proceeded back to the door. This time he saw a tall man tiptoeing away from the alcove, followed by petitioner, toward the stairway. Lasky came out of his apartment, slammed the door behind him, and then gave chase, gun in hand, as the two men began to run down the stairs. He apprehended petitioner on the stairway between the fourth and fifth floors, and asked what he was doing in the building. Petitioner replied that he was looking for a girl friend, but refused to give her name, saying that she was a married woman. Lasky then "frisked" petitioner for a weapon, and discovered in his right pants pocket a plastic envelope. The envelope contained a tension bar, 6 picks and 2 Allen wrenches with the short leg filed down to a screwdriver edge. Petitioner was subsequently convicted for possession of burglarly tools.

I would hold that at the time Lasky seized petitioner, he had probable cause to believe that petitioner was on some kind of burglary or housebreaking mission.* In my view he had probable cause to seize petitioner and accordingly to conduct a limited search of his person for weapons.

*See N. Y. Pen. Code §§ 140.20, 140.25 (McKinney 1967).

SUPREME COURT OF THE UNITED STATES

Nos. 63 AND 74.—OCTOBER TERM, 1967.

63 Nelson Sibron, Appellant,

v.

State of New York.

John Francis Peters, Appellant,

74

v.

State of New York.

On Appeals From the
Court of Appeals of
New York.

[June 10, 1968.]

MR. JUSTICE WHITE, concurring.

I join Parts I–IV of the Court's opinion. With respect to appellant Peters, I join the affirmance of his conviction, not because there was probable cause to arrest, a question I do not reach, but because there was probable cause to stop Peters for questioning and thus to frisk him for dangerous weapons. See my concurring opinion in *Terry v. Ohio*, ante, p. —. While patting down Peters' clothing the officer "discovered an object in his pocket which might have been used as a weapon." *Ante*, p. —. That object turned out to be a package of burglar's tools. In my view those tools were properly admitted into evidence.

SUPREME COURT OF THE UNITED STATES

Nos. 63 AND 74.—OCTOBER TERM, 1967.

63	Nelson Sibron, Appellant,	} On Appeals From the Court of Appeals of New York.
	v.	
	State of New York.	
74	John Francis Peters, Appellant,	
	v.	
	State of New York.	

[June 10, 1968.]

MR. JUSTICE FORTAS, concurring.

1. I would construe *St. Pierre v. United States*, 319 U. S. 41 (1943), in light of later cases, to mean that a criminal case is moot if it appears that no collateral legal consequences will be imposed on the basis of the challenged conviction. (Cf. majority opinion, p. 15.)

2. I join without qualification in the Court's judgment and opinion concerning the standards to be used in determining whether § 180-a as applied to particular situations is constitutional. But I would explicitly reserve the possibility that a statute purporting to authorize a warrantless search might be so extreme as to justify our concluding that it is unconstitutional "on its face," regardless of the facts of the particular case. To the extent that the Court's opinion may indicate the contrary, I disagree. (Cf. majority opinion, p. 17.)

3. In Sibron's case (No. 63), I would conclude that we find nothing in the record of this case or pertinent principles of law to cause us to disregard the confession of error by counsel for Kings County. I would not discourage admissions of error nor would I disregard them. (Cf. majority opinion, pt. II, pp. 16-17.)

SUPREME COURT OF THE UNITED STATES

Nos. 63 AND 74.—OCTOBER TERM, 1967.

63 Nelson Sibron, Appellant,
v.
State of New York.
74 John Francis Peters, Appellant,
v.
State of New York.

On Appeals From the
Court of Appeals of
New York.

[June 10, 1968.]

MR. JUSTICE HARLAN, concurring in the results.

I fully agree with the results the Court has reached in these cases. They are, I think, consonant with and dictated by the decision in *Terry v. Ohio*, *ante*, p. —. For reasons I do not understand, however, the Court has declined to rest the judgments here upon the principles of *Terry*. In doing so it has, in at least one particular, made serious inroads upon the protection afforded by the Fourth and Fourteenth Amendments.

The Court is of course entirely correct in concluding that we should not pass upon the constitutionality of the New York stop-and-frisk law "on its face." The statute is certainly not unconstitutional on its face: that is, it does not plainly purport to authorize unconstitutional activities by policemen. Nor is it "constitutional on its face" if that expression means that any action now or later thought to fall within the terms of the statute is, *ipso facto*, within constitutional limits as well. No statute, state or federal, receives any such *imprimatur* from this Court.

This does not mean, however, that the statute should be ignored here. The State of New York has made a deliberate effort to deal with the complex problem of on-the-street police work. Without giving *carte blanche*

to any particular verbal formulation, we should, I think, where relevant, indicate the extent to which that effort has been constitutionally successful. The core of the New York statute is the permission to stop any person reasonably suspected of crime. Under the decision in *Terry* a right to stop may indeed be premised on reasonable suspicion and does not require probable cause; and hence the New York formulation is to that extent constitutional. This does not mean that suspicion need not be "reasonable" in the constitutional as well as the statutory sense. Nor does it mean that this Court has approved more than a momentary stop or has indicated what questioning may constitutionally occur during a stop, for the cases before us do not raise these questions.¹

Turning to the individual cases, I agree that the conviction in No. 63, *Sibron*, should be reversed, and would do so upon the premises of *Terry*. At the outset, I agree that sufficient collateral legal consequences of *Sibron's* conviction have been shown to prevent this case from being moot, and I agree that the case should not be reversed simply on the State's confession of error.

The considerable confusion that has surrounded the "search" or "frisk" of *Sibron* that led to the actual recovery of the heroin seems to me irrelevant for our purposes. Officer Martin repudiated his first statement, which might conceivably have indicated a theory of "abandonment," see *ante*, pp. 3-4. No matter which of the other theories is adopted, it is clear that there was at least a forcible frisk, comparable to that which occurred in *Terry*, which requires constitutional justification.

Since carrying heroin is a crime in New York, probable cause to believe *Sibron* was carrying heroin would

¹ For a thoughtful study of many of these points, see ALI Model Code of Pre-Arrestment Procedure, Tentative Draft No. 1, §§ 2.01, 2.02, and the commentary on these sections appearing at pp. 87-105.

also have been probable cause to arrest him. As the Court says, Officer Martin clearly had neither. Although Sibron had had conversations with several known addicts, he had done nothing, during the several hours he was under surveillance, that made it "probable" that he was either carrying heroin himself or engaging in transactions with these acquaintances.

Nor were there here reasonable grounds for a *Terry*-type "stop" short of an arrest. I would accept, as an adequate general formula, the New York requirement that the officer must "reasonably suspect" that the person he stops "is committing, has committed or is about to commit a crime." N. Y. Code Crim. Proc. § 180-a: "On its face," this requirement is, if anything, more stringent than the requirement stated by the Court in *Terry*: "where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot" *Ante*, p. 28. The interpretation of the New York statute is of course a matter for the New York courts, but any particular stop must meet the *Terry* standard as well.

The forcible encounter between Officer Martin and Sibron did not meet the *Terry* reasonableness standard. In the first place, although association with known criminals may, I think, properly be a factor contributing to the suspiciousness of circumstances, it does not, entirely by itself, create suspicion adequate to support a stop. There must be something at least in the activities of the person being observed or in his surroundings that affirmatively suggests particular criminal activity, completed, current, or intended. That was the case in *Terry*, but it palpably was not the case here. For eight continuous hours, up to the point when he interrupted Sibron eating a piece of pie, Officer Martin apparently observed not a single suspicious action and heard not a single suspicious word on the part of Sibron himself or any person with

whom he associated. If anything, that period of surveillance pointed away from suspicion.

Furthermore, in *Terry*, the police officer judged that his suspect was about to commit a violent crime and that he had to assert himself in order to prevent it. Here there was no reason for Officer Martin to think that an incipient crime, or flight, or the destruction of evidence would occur if he stayed his hand; indeed, there was no more reason for him to intrude upon Sibron at the moment when he did than there had been four hours earlier, and no reason to think the situation would have changed four hours hence. While no hard-and-fast rule can be drawn, I would suggest that one important factor, missing here, that should be taken into account in determining whether there are reasonable grounds for a forcible intrusion is whether there is any need for immediate action.

For these reasons I would hold that Officer Martin lacked reasonable grounds to introduce forcibly upon Sibron. In consequence, the essential premise for the right to conduct a self-protective frisk was lacking. See my concurring opinion in *Terry*, ante, p. —. I therefore find it unnecessary to reach two further troublesome questions. First, although I think that, as in *Terry*, the right to frisk is automatic when an officer lawfully stops a person suspected of a crime whose nature creates a substantial likelihood that he is armed, it is not clear that suspected possession of narcotics falls into this category. If the nature of the suspected offense creates no reasonable apprehension for the officer's safety, I would not permit him to frisk unless other circumstances did so. Second, I agree with the Court that even where a self-protective frisk is proper, its scope should be limited to what is adequate for its purposes. I see no need here to resolve the question whether this frisk exceeded those bounds.

Turning now to No. 74, *Peters*, I again agree that the conviction should be upheld, but here I would differ strongly and fundamentally with the Court's approach. The Court holds that the burglar's tools were recovered from Peters in a search incident to a lawful arrest. I do not think that Officer Lasky had anything close to probable cause to arrest Peters before he recovered the burglar's tools. Indeed, if probable cause existed here, I find it difficult to see why a different rationale was necessary to support the stop and frisk in *Terry* and why States such as New York have had to devote so much thought to the constitutional problems of field interrogation. This case will be the latest in an exceedingly small number of cases in this Court indicating what suffices for probable cause. While, as the Court noted in *Terry*, the influence of this Court on police tactics "in the field" is necessarily limited, the influence of a decision here on hundreds of courts and magistrates who have to decide whether there is probable cause for a real arrest or a full search will be large.

Officer Lasky testified that at 1 o'clock in the afternoon he heard a noise at the door to his apartment. He did not testify, nor did any state court conclude, that this "led him to believe that someone sought to force entry." *Ante*, p. 24. He looked out into the public hallway and saw two men whom he did not recognize, surely not a strange occurrence in a large apartment building. One of them appeared to be tip-toeing. Lasky did not testify that the other man was tip-toeing or that either of them was behaving "furtively." *Ibid*. Lasky left his apartment and ran to them, gun in hand. He did not testify that there was any flight," *ante*, p. 24,² though flight at the approach of gun-carrying

²It is true, as the Court states, that the New York courts attributed such a statement to him. The attribution seems to me unwarranted by the record.

strangers (Lasky was apparently not in uniform) is hardly indicative of *mens rea*.

Probable cause to arrest means evidence that would warrant a prudent and reasonable man (such as a magistrate, actual or hypothetical) in believing that a particular person has committed or is committing a crime.³ Officer Lasky had no extrinsic reason to think that a crime had been or was being committed, so whether it would have been proper to issue a warrant depends entirely on his statements of his observations of the men. Apart from his conclusory statement that he thought the men were burglars, he offered very little specific evidence. I find it hard to believe that if Peters had made good his escape and there were no report of a burglary in the neighborhood, this Court would hold it proper for a prudent neutral magistrate to issue a warrant for his arrest.⁴

In the course of upholding Peters' conviction, the Court makes two other points that may lead to future

³ *E. g.*, *Beck v. Ohio*, 379 U. S. 89; *Rios v. United States*, 364 U. S. 253; *Henry v. United States*, 361 U. S. 98. In *Henry*, *supra*, at 100, the Court said that 18 U. S. C. § 3052, "states the Constitutional standard" for felony arrests by FBI agents without warrant. That section at that time authorized agents to "make arrests without warrant for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person has committed or is committing such a felony." Under *Ker v. California*, 374 U. S. 23, a parallel standard is applicable to warrantless arrests by state and local police.

⁴ Compare *Henry v. United States*, 361 U. S. 98, in which the Court said there was "far from enough evidence . . . to justify a magistrate in issuing a warrant." *Id.*, at 103. Agents knew that a federal crime, theft of whisky from an interstate shipment, had been committed "in the neighborhood." Petitioner was observed driving into an alley, picking up packages, and driving away. I agree that these facts did not constitute probable cause, but find it hard to see that the evidence here was more impressive.

confusion. The first concerns the "moment of arrest." If there is an escalating encounter between a policeman and a citizen, beginning perhaps with a friendly conversation but ending in imprisonment, and if evidence is developing during that encounter, it may be important to identify the moment of arrest, *i. e.*, the moment when the police were not permitted to proceed further unless they by then had probable cause. This moment-of-arrest problem is not, on the Court's premises, in any way involved in this case: the Court holds that Officer Lasky had probable cause to arrest at the moment he caught Peters, and hence probable cause clearly preceded anything that might be thought an arrest. The Court implies, however, that although there is no problem about whether the arrest of Peters occurred *late* enough, *i. e.*, after probable cause developed, there might be a problem about whether it occurred *early* enough, *i. e.*, before Peters was searched. This seems to me a false problem. Of course, the fruits of a search may not be used to justify an arrest to which it is incident, but this means only that probable cause to arrest must precede the search. If the prosecution shows probable cause to arrest prior to a search of a man's person, it has met its total burden. There is *no* case in which a defendant may validly say, "Although the officer had a right to arrest me at the moment when he seized me and searched my person, the search is invalid because he did not in fact arrest me until afterwards."

This fact is important because, as demonstrated by *Terry*, not every curtailment of freedom of movement is an "arrest" requiring antecedent probable cause. At the same time, an officer who does have probable cause may of course seize and search immediately. Hence while certain police actions will undoubtedly turn an encounter into an arrest requiring antecedent probable cause,

the prosecution must be able to date the arrest as *early* as it chooses following the obtaining of probable cause.

The second possible source of confusion is the Court's statement that "Officer Lasky did not engage in an unrestrained and thorough-going examination of Peters and his personal effects." *Ante*, p. 25. Since the Court found probable cause to arrest Peters, and since an officer arresting on probable cause is entitled to make a very full incident search,⁵ I assume that this is merely a factual observation. As a factual matter, I agree with it.

Although the articulable circumstances are somewhat less suspicious here than they were in *Terry*, I would affirm on the *Terry* ground that Officer Lasky had reasonable cause to make a forced stop. Unlike probable cause to arrest, reasonable grounds to stop do not depend on any degree of likelihood that a crime *has* been committed. An officer may forcibly intrude upon an incipient crime even where he could not make an arrest for the simple reason that there is nothing to arrest anyone for. Hence although Officer Lasky had small reason to believe that a crime had been committed, his right to stop Peters can be justified if he had a reasonable suspicion that he was about to attempt burglary.

It was clear that the officer had to act quickly if he was going to act at all, and, as stated above, it seems to me that where immediate action is obviously required, a police officer is justified in acting on rather less objectively articulable evidence than when there is more time for consideration of alternative courses of action. Perhaps more important, the Court's opinion in *Terry* emphasized the special qualifications of an experienced police officer. While "probable cause" to arrest or search has always depended on the existence of hard evidence

⁵ The leading case is *United States v. Rabinowitz*, 339 U. S. 56.

that would persuade a "reasonable man," in judging on-the-street encounters it seems to me proper to take into account a police officer's trained instinctive judgment operating on a multitude of small gestures and actions impossible to reconstruct. Thus the statement by an officer that "he looked like a burglar to me" adds little to an affidavit filed with a magistrate in an effort to obtain a warrant. When the question is whether it was reasonable to take limited but forcible steps in a situation requiring immediate action, however, such a statement looms larger. A court is of course entitled to disbelieve the officer (who is subject to cross-examination), but when it believes him and when there are some articulable supporting facts, it is entitled to find action taken under fire to be reasonable.

Given Officer Lasky's statement of the circumstances, and crediting his experienced judgment as he watched the two men, the state courts were entitled to conclude, as they did, that Lasky forcibly stopped Peters on "reasonable suspicion." The frisk made incident to that stop was a limited one, which turned up burglar's tools. Although the frisk is constitutionally permitted only in order to protect the officer, if it is lawful the State is of course entitled to the use of any other contraband that appears.

For the foregoing reasons I concur in the results in these cases.

SUPREME COURT OF THE UNITED STATES

Nos. 63 AND 74.—OCTOBER TERM, 1967.

Nelson Sibron, Appellant,

63

v.

State of New York.

John Francis Peters, Appellant,

74

v.

State of New York.

On Appeals From the
Court of Appeals of
New York.

[June 10, 1968.]

MR. JUSTICE BLACK, concurring and dissenting.

I concur in the affirmance of the judgment against Peters but dissent from the reversal of No. 63, *Sibron v. New York* and would affirm this conviction. Sibron was convicted of violating New York's anti-narcotics law on the basis of evidence seized from him by the police. The Court reverses on the ground that the narcotics were seized as the result of an unreasonable search in violation of the Fourth Amendment. The Court has decided today in *Terry v. Ohio* and in No. 74, *Peters v. New York*, that a policeman does not violate the Fourth Amendment when he makes a limited search for weapons on the person of a man whom the policeman has probable cause to believe has a dangerous weapon on him with which he might injure the policeman or others or both, unless he is searched and the weapon is taken away from him. And, of course, under established principles it is not a violation of the Fourth Amendment for a policeman to search a person whom he has probable cause to believe is committing a felony at the time. For both these reasons I think the seizure of the narcotics from Sibron was not unreasonable under the Fourth Amendment. Because of a different emphasis on the facts, I find it necessary to restate them.

About 4 p. m. Patrolman Martin saw appellant Sibron in the vicinity of 742 Broadway. From then until 12 o'clock midnight Sibron remained there. During that time the policeman saw Sibron talking with six or eight persons whom the policeman knew from past experience to be narcotics addicts. Late along toward 12 o'clock, Sibron went into a restaurant and there the patrolman saw Sibron speak with three more known addicts. While Sibron was eating in the restaurant the policeman went to him and asked him to come out. Sibron came out. There the officer said to Sibron, "You know what I am after." Sibron mumbled something and reached into his left coat pocket. The officer also moved his hand to the pocket and seized what was in it, which turned out to be heroin. The patrolman testified at the hearing to suppress use of the heroin as evidence that he "thought he [Sibron] might have been reaching for a gun."

Counsel for New York for some reason that I have not been able to understand, has attempted to confess error—that is, that for some reason the search or seizure here violated the Fourth Amendment. I agree with the Court that we need not and should not accept this confession of error. But, unlike the Court, I think, for two reasons, that the seizure did not violate the Fourth Amendment and that the heroin was properly admitted in evidence.

First. I think there was probable cause for the policeman to believe that when Sibron reached his hand to his coat pocket, Sibron had a dangerous weapon which he might use if it were not taken away from him. This, according to the Court's own opinion, seems to have been the ground on which the Court of Appeals of New York justified the search, since it "affirmed on the basis of § 180-a, which authorizes such a search when the officer 'reasonably suspects that he is in danger of

life or limb.' " *Ante*, p. —. And it seems to me to be a reasonable inference that when Sibron, who had been approaching and talking to addicts for eight hours, reached his hand quickly to his left coat pocket, he might well be reaching for a gun. And as the Court has emphasized today in its opinions in the other stop and frisk cases, a policeman under such circumstances has to act in a split second; delay may mean death for him. No one can know when an addict may be moved to shoot or stab, and particularly when he moves his hand hurriedly to a pocket where weapons are known to be habitually carried, it behooves an officer who wants to live to act at once as this officer did. It is true that the officer might also have thought Sibron was about to get heroin instead of a weapon. But the law enforcement officers all over the Nation have gained little protection from the courts through opinions here if they are now left helpless to act in self defense when a man associating intimately and continuously with addicts, upon meeting an officer, shifts his hand immediately to a pocket where weapons are constantly carried.

In appraising the facts as I have I realize that the Court has chosen to draw inferences different from mine and those drawn by the courts below. The Court for illustration draws inferences that the officer's testimony at the hearing continued upon the "plain premise that he had been looking for narcotics all the time." *Ante*, p. —, n. 4. But this Court is hardly, at this distance from the place and atmosphere of the trial, in a position to overturn the trial and appellate courts on its own independent finding of an unspoken "premise" of the officer's inner thoughts.

In acting upon its own findings and rejecting those of the lower state courts, this Court, sitting in the marble halls of the Supreme Court Building in Washington, D. C., should be most cautious. Due to our

holding in *Mapp v. Ohio*, 367 U. S. 643, we are due to get for review literally thousands of cases raising questions like those before us here. If we are setting ourselves meticulously to review all such findings our task will be endless and many will rue the day when *Mapp* was decided. It is not only wise but imperative that where findings of the facts of reasonableness and probable cause are involved in such state cases, we should not overturn state court findings unless in the most extravagant and egregious errors. It seems fantastic to me even to suggest that this is such a case. I would leave these state court holdings alone.

Second, I think also that there was sufficient evidence here on which to base findings that after recovery of the heroin, in particular, an officer could reasonably believe there was probable cause to charge Sibron with violating New York's narcotics laws. As I have previously argued, there was, I think, ample evidence to give the officer probable cause to believe Sibron had a dangerous weapon and that he might use it. Under such circumstances the officer had a right to search him in the very limited fashion he did here. Since, therefore, this was a reasonable and justified search, the use of the heroin discovered by it was admissible in evidence.

I would affirm.

